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Revised, June 1985

ANTI-CREAM-SKIMMING REGULATIONS: DO THEY INFRINGE CABLE TELEVISION'S FIRST AMENDMENT RIGHTS?

Working Paper No. 410-A

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FOR DISCUSSION PURPOSES ONLY

Cable television has progressed substantially from its originally limited role of enhancing television broadcast signals to its current role of providing original programming to over 30 million subscribers throughout the United States.[1] Beginning in the late 1940's, cable served primarily to bring, via coaxial cable, better quality signals or distant signals from over-the-air broadcasters[2] into the home.[3] As cable technology developed, cable became capable both of retransmitting broadcast television signals and of originating programming within the same system.[4] Cable technology currently can provide multiple channels of local and distant broadcast television and original programs into the home.[5]

With the recent improvements in technology, cable has become increasingly important as a separate medium. Since it has become able to provide original programming, its penetration rate has increased substantially to the point where cable systems now serve approximately 30 million homes.[6] In response to this phenomenon, Congress has recently seen fit to pursue a more active role in cable's evolution in order to give wide berth to development of the industry.[7] This past year, Senate bill 66 [S.66], which as revised became the Cable Telecommunications Act of 1984, was introduced with the stated purpose of eliminating "unnecessary and burdensome restrictions which place cable at a competitive disadvantage to other providers of similar services."[8] Thus, Congress has joined the marketplace in recognizing cable's importance in the communication field. Indeed, Congress has gone so far as to recognize that cable, like the other media, is entitled to First Amendment protection.[9]

Despite the growing awareness of first amendment rights in cable, state and local governments have extensively regulated cable with franchise award

requirements. One requirement in particular raises significant first amendment questions: in order to gain access to a given community, a cable operator may be required to wire the entire community, including outlying or less profitable areas. Such "anti-cream-skimming" rules impose financial burdens on operators, effectively excluding some from competing at all and diverting funds away from programming to costs of construction. This Article will examine anti-cream-skimming regulation under evolving first amendment doctrine. First, cable's first amendment entitlement will be briefly discussed. The appropriate level of first amendment protection will then be examined, comparing cable to both the newspaper and broadcast media to determine to what extent cable can be analogized to either media in first amendment terms. Finally, anti-cream-skimming rules will be analyzed under the two-pronged test applicable under current first amendment case law that looks both to the substantiality of the government's interest and to whether the interest can be achieved in a less restrictive manner. The Article concludes that anti-cream-skimming rules cannot be sustained under that test despite legitimate government policies underlying them.

1. CABLE'S ENTITLEMENT TO FIRST AMENDMENT PROTECTION

Cable television, as a medium for the communication and exchange of ideas, is clearly protected by the first amendment.[10] Three rationales independently entitle cable to the full scope of first amendment protection.

By bringing information into the home, cable functions as a distributor of news and information. It has long been established that the means of distributing communications are entitled to first amendment protection. In a series of cases striking down ordinances prohibiting distribution of handbills, the Supreme Court has emphasized repeatedly that distribution is a

protected form of freedom of the press.[11] More recently, courts have consistently held that newsboxes are protected by the first amendment precisely because they are a means of distributing news.[12] Cable television also functions as a distributor of information, not only in presenting television news programs and transmitting direct feeds from local newspapers,[13] but also in carrying a wide variety of programming relating to current and past events.

Second, by originating its own programs, and also by selecting which stations to transmit, cable performs an editorial function similar to that performed by the traditional forms of protected media--newspapers, television, and radio.[14] The historical primacy of the editorial aspects of the information media and the concurrent need for editorial freedom are established beyond question.[15] Accordingly, cable is protected by the first amendment by virtue of its editorial characteristics.[16]

Finally, by serving as a medium for the exchange of ideas, cable is entitled to first amendment protection. In Joseph Burstyn v. Wilson,[17] the Supreme Court invalidated on first amendment grounds a statute requiring licensing prior to movie exhibition and prohibiting the exhibition of certain types of films. In finding the first amendment applicable to movies, the Supreme Court used language that also defines a large part of cable's programming:

> "It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform."[18]

This concept--that entertainment functions as an exchange of ideas and is thereby subject to first amendment protection--has recently been reaffirmed by the Supreme Court in a decision striking down an ordinance which by its terms prohibited all live entertainment, but was in effect directed primarily at adult entertainment.[19] Accordingly, cable enjoys first amendment protection for entertainment, as well as for news or political, programming.

In sum, by virtue of its distribution, editorial, and idea-exchange functions, cable is entitled to protection against governmental regulations that interfere with recognized first amendment freedoms.

II. TO WHAT LEVEL OF FIRST AMENDMENT PROTECTION IS CABLE ENTITLED?

Given that cable is entitled to first amendment protection, the question arises what level of protection is appropriate. Several courts faced with this issue have compared cable to both the newspaper and broadcast media, the two extremes of media protection.[20] Under current case law, newspapers are afforded extremely broad first amendment protection[21] whereas the rights accorded to the broadcast media are sharply circumscribed.[22] Determinations of protection for cable in recent cases have depended upon findings that cable's attributes were more analogous either to those of newspapers or those of broadcasters.[23] However, because each type of media may be entitled to a different first amendment standard,[24] cable may deserve a different level of protection than that applied to either newspaper or broadcast media.[25]

A. Newspaper Protection

Newspapers enjoy extensive protection under the first amendment. In Miami Herald Publishing Company v. Tornillo,[26] the Supreme Court held that newspapers could not, consistent with established constitutional principles, be subject to rules requiring a right of reply by political candidates or fair

coverage of public issues[27]--rules to which the broadcast media could validly be subject.[28] Such rules would, the Court held, impermissibly interfere with a newspaper's first amendment rights of editorial freedom and control over content.[29] Although the Court recognized that there was a valid interest in "a responsible press," that interest did not outweigh a newspaper's first amendment freedoms.[30] Thus, the first amendment protections afforded to newspapers will result in invalidation on constitutional grounds of most government actions that interfere with editorial content.[31]

B. Broadcast Protection

In contrast to the broad scope of protection afforded the print media, that applied to the broadcast media is considerably narrower.[32] The broadcast media of television and radio are subject to a significantly greater degree of regulation than are the print media.[33]

In 1927, shortly after a pronounced rise in radio popularity and consequent crowding of the air waves, Congress perceived a growing need for regulatory legislation and created the Federal Radio Commission.[34] The Commission was charged with allocating frequencies among applicants and promulgating rules to promote the public interest in radio broadcasting.[35] Pursuant to additional legislation, the Federal Radio Commission (now the Federal Communications Commission[36]) continued to develop rules pertaining to all aspects of radio and television broadcasting, from licensing standards and procedures to the manner of reporting on certain types of issues.[37]

Several rationales are cited to support the different treatment of newspapers and the broadcast media: physical scarcity of broadcast frequencies, confusion, enhancement of first amendment values and fear of monopolization of the market. Analysis of these four rationales is a useful first step to determining the appropriate level of first amendment protection for cable.

1. Physical scarcity. Radio and television are broadcast by means of sound frequencies. However, due to the physical limits of the sound spectrum, there are only a finite number of frequencies available for use by these media.[38] Thus, Congress and the FCC found it necessary to allocate the available frequencies among only a few of the many competing applicants,[39] and the Supreme Court has therefore determined that there is no first amendment right to broadcast.[40] As there is no constitutional right to broadcast, it follows, and the Court has so held, that broadcast license requirements are valid,[41] as are regulations pertaining to the licensee's use of the allocated frequency.[42] Thus, the physical scarcity of the means of broadcasting of necessity requires regulations to promote the most advantageous allocation and use of a limited resource.

2. Preventing confusion. Closely related to the physical scarcity rationale is the argument that failure to regulate appropriately will lead to air wave confusion. If all who desired to communicate via broadcast frequencies were permitted to do so, there would inevitably be massive interference and a complete failure of intelligible communication due to overcrowding of frequencies.[43] Accordingly, regulations are necessary to ensure that, although not all can speak, some will be permitted to. Regulation prevents a medium of communication from becoming a cacophony of noise.[44]

3. First amendment interest of listeners. Also in accord with the rationales of physical scarcity and prevention of confusion is the argument that regulation allows the broadcast media to serve the public interest. Because only a limited number of potential communicators may use broadcast frequencies, the interests of the public must be protected from abusive use of the media by the privileged few speakers.[45] Thus, regulations promulgated in the public interest enhance the first amendment freedoms of listeners, even

though superficially they may appear to interfere with the rights of the broadcasters.[46] Appropriate regulations, such as license grants in the public interest[47] and the fairness doctrine,[48] ensure that the interests of the public in a free flow of ideas will be protected. In an oft-quoted statement, the Supreme Court explained that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[49] By ensuring that there is adequate coverage of public issues, regulation prevents broadcasters from censoring all views but their own and thereby encourages the production of a well-informed public, a desirable first amendment goal.

4. Preventing monopoly. Finally, regulation of the broadcast media is intended to prevent monopolization of the market.[50] In Federal Communications Commission v. National Citizens Committee for Broadcasting,[51] the Supreme Court upheld the FCC's rules[52] governing co-ownership of radio or television stations and newspapers in the same community.[53] Those regulations promoted the public interest in diversified broadcasting by preventing monopolization of the "local marketplace of ideas."[54] Accordingly, because furtherance of diversified communications is recognized as a valid first amendment objective, that interest also serves to authorize broadcast regulations that prevent monopolization of the broadcast media.[55]

Relying on these four rationales, the Federal Communications Commission has promulgated various rules regulating the broadcast media,[56] which rules are generally upheld by the Supreme Court. In Red Lion Broadcasting v. Federal Communications Commission,[57] the Court sustained against a broadcaster's challenge FCC rules establishing the Fairness Doctrine for radio and television. The Fairness Doctrine imposes a twofold duty upon broadcasters: the broadcaster must give adequate and balanced coverage to public views,[58] and a public figure[59] must be permitted an opportunity to respond to personal

attacks on the air.[60] Similarly, a broadcaster that endorses or criticizes one political candidate, must offer the other candidates or the criticized candidate equal reply time.[61]

The Supreme Court has also recognized that broadcast licenses may properly be denied when not in the public interest.[62] Thus, licenses to broadcast may be granted only to those who satisfy the "public interest, convenience and necessity" standard applied by the FCC[63] and the Court will generally defer to the FCC's judgment of how the public interest is best served.[64] By contrast, the Court has consistently struck down subjective licensing requirements for those who wish to communicate through media of communication other than broadcast frequencies.[65]

Finally, in Federal Communications Commission v. Pacifica Foundation,[66] the Supreme Court upheld regulation of a non-obscene radio program, relying on the unique nature of broadcasting.[67] The Court discussed both the pervasive nature of broadcasting that brings material into the home without protection for the viewer or listener[68] and the unique accessibility of broadcasting to children.[69] The Court emphasized the narrow scope of its holding,[70] however, and left open the possibility that equivalent broadcasting at another time of day would be protected.[71] Nevertheless, the Court in Pacifica authorized application of sanctions to a type of broadcast programming that could not have been regulated if it were in print.[72]

In sum, the special attributes of broadcasting have been held to justify regulations that would be unconstitutional if applied to other forms of speech. Proponents of cable regulation argue that if cable possesses the attributes of broadcasting, it too should be subject to more extensive regulation in the public interest.[73] The accuracy of that proposition depends on whether cable does indeed possess the attributes of broadcasting.

C. Defining a Standard of First Amendment Protection for Cable

Since different standards of first amendment protection apply to different media,[74] cable may be entitled to an entirely different level of protection than that applied to either newspapers or broadcast media. Thus, while it is helpful to analogize cable's characteristics to those of newspaper and broadcast,[75] such analogizing will not necessarily be determinative of the proper standard applicable to cable. Rather, a composite standard, reflective of cable's unique attributes, may be required.

Cable's nature is a hybrid; it is a mixed media, combining characteristics of both newspaper and the broadcast media. Cable carries programming, whether original or retransmitted, into the home. Unlike television broadcasting, however, which is dominated by three giant networks that transmit programming on a national basis, cable systems tend to be more localized, serving different areas of the country, state, and sometimes even the same city.[76] Moreover, the same cable operator will often offer different tiers of service, including the option of purchasing a lock-box by which the consumer may shut off a station from view, for example, by unsupervised children.[77] Further, in contrast to television that operates on broadcast frequencies, cable operates by use of a coaxial cable carrying signals from the operator directly to the television set and therefore involves use of public streets as a conduit for the cable signal. Cable is similar to newspapers because it carries newspaper stories and transmits newspaper feeds directly over television. Cable's transmission of news and other information by non-broadcast methods further likens it to newspapers. In addition, cable receives programs from varied sources, as do newspapers and magazines, and viewers choose whether or not to invite cable into their home. Thus, a cable system features various aspects common to either or both the print and broadcast media.[78]

Since the broadest scope of first amendment protection is enjoyed by newspapers,[79] it appears helpful to assume that cable should be constitutionally treated as a newspaper where cable assumes newspaper characteristics. Where cable's attributes deviate significantly from those of newspapers, however, the several rationales discussed above may justify narrower protection.[80] The courts comparing cable to newspapers and the broadcast media in determining a proper first amendment standard have offered several theories to justify broader regulation of cable than is permissible for newspapers.[81]

1. Physical scarcity. Physical scarcity is sometimes used as a rationale to justify similar treatment of cable and broadcast.[82] The theory is that if cable is a physically scarce medium, like broadcast, regulation may be justified because of that scarcity.[83] However, no court has made such a factual finding. Rather, the courts that have reached the issue have come to either no conclusion, remanding the case for additional evidence,[84] or have found no evidence of physical scarcity sufficient to justify regulation on that basis.[85]

Cable uses no broadcast frequencies for transmission of programming. Instead, cable programs are transmitted via coaxial cable capable of carrying many more channels--and hence programs--than broadcast. Thus, no problem of physical scarcity exists comparable to that in the broadcast systems that transmit solely through the air waves.[86] Nor is there the potential for interference among users of different frequencies.[87] The arguments of scarcity relating to means of transmission simply do not apply to cable.

Some courts have suggested that physical scarcity might nevertheless exist because of the limited physical space in which cables can be run.[88] However, lack of space has not been shown to be troublesome to the same degree that crowding among frequencies was at the time Congress determined that

broadcast frequencies should be allocated.[89] Moreover, lack of infinite cable-laying space should not be constitutionally significant. Analogous physical space limitations have been rejected as a rationale to justify interference with newspapers. In Miami Herald Publishing Company v. Tornillo,[90] the Supreme Court refused to apply the reply doctrine[91] to newspapers even though the Court recognized that newspapers could not expand their editorial space limitlessly.[92] Thus, as support for restrictions on first amendment rights, space limitations are not the equivalent of crowding of the electromagnetic spectrum.[93]

Even if it could be established that cable suffered from physical scarcity of the sort that justifies broadcast regulation, the Supreme Court has recently observed that physical scarcity will justify only regulations specifically designed to foster the presentation of diversified views.[94] This latest restriction on scarcity-based regulation attempts to ameliorate the problem of limited viewpoints being expressed while preventing unnecessary infringement of the broadcaster's first amendment rights. Thus, a finding of physical scarcity in cable would at most justify "diversity-enhancing" regulations of the type currently applied in broadcast, but not broader or more far-reaching regulation of cable's business practices or geographical coverage.

2. Economic scarcity. A more frequently cited and relied upon rationale for regulation of the cable industry is a theory of economic scarcity. It is argued that if economic factors dictate that only one cable system exist, that system should be regulated to prevent the public harm that might result from an unregulated monopoly.[95] Thus, proponents argue that economic scarcity is equivalent to physical scarcity as justification for government regulation.

Courts faced with the issue of economic scarcity have reached contrary conclusions as to its existence and implications. Some courts have determined

that there is evidence that cable is a natural monopoly, relying either upon the government's contentions or findings as to economic scarcity[96] or upon the court's own economic analysis of the cable industry.[97] One appellate court remanded a case for a factual determination of whether cable is an economically scarce medium, because it had "absolutely no facts or expert opinion upon which to make such a determination."[98]

However, none of the cases that have found cable to be an economically scarce medium have cited concrete evidence to support their conclusions. This lack of evidence would appear to be a major obstacle to acceptance of a theory of economic scarcity as justification for regulation. No court has pointed to persuasive evidence that economic factors preclude existence of more than one cable system.[99] Instead, some courts have relied on the fallacious argument forwarded by municipalities that, because only one cable system has been authorized to operate in a particular area, only one system can operate there economically.[100] Not only is the argument bootstrapping at its finest, but the premise is vitiated by the fact that some communities have granted nonexclusive franchises to cable systems operating in the same area.[101] Before courts rely upon a claim that cable is a natural monopoly to justify regulation of a constitutionally protected medium, more compelling evidence to support such a characterization of cable should be produced.

The case for economic scarcity is further weakened by the increasing competition to cable from other technologies. In Suburban Cablevision v. Earth Satellite Communications,[102] the court recognized the actual and potential competition to cable from such technologies as Satellite Master Antenna Television Systems.[103] The Senate has also acknowledged that other technologies are competitive with cable,[104] as have several commentators.[105] In an antitrust context, the Fourth Circuit has upheld a district court's finding

that the pay television market includes "cinema, broadcast television, video disks and cassettes and other types of leisure and entertainment-related businesses."[106] Thus, cable would appear to be in competition with many other forms of communication that reach the home. Such alternative video program sources should be considered in determining whether there is economic scarcity sufficient to justify intrusive government regulation.

Finally, because there are alternatives to the service cable offers, cable is a non-essential service.[107] Unlike gas, electricity or water, for which there are no alternatives, cable television is not essential to human existence. Thus, even if it were economically viable for only one cable system to operate in a given locality, the non-essential nature of cable renders it inappropriate to regulate cable as a government-sanctioned monopoly.[108]

In sum, given both the lack of concrete evidence to support a theory of cable as an economically scarce medium and the growing evidence that cable competes with other communications media, the existence of economic scarcity as an attribute of the cable industry is at best speculative at this time.

3. Significance of economic scarcity. Assuming, however, that economic scarcity impedes simultaneous development of cable systems in the same locale, the next hurdle is whether economic scarcity is constitutionally significant to validate governmental impingement upon cable's first amendment rights. The cases that have faced that issue have reached conflicting conclusions. Two courts have determined that the economic scarcity rationale is insufficient justification for treating cable differently than newspapers.[109] In Home Box Office v. Federal Communications Commission, the court reasoned that since economic scarcity is insufficient to justify regulation of the press, and there was no proof of significant differences between cable and the press,

economic scarcity was also insufficient to justify regulation of cable.[110] The court in Midwest Video v. Federal Communications Commission, quoting with approval Home Box Office v. Federal Communications Commission, viewed cable in the same first amendment light as newspapers.[111]

In contrast to those two decisions, other courts have accepted the economic scarcity rationale as fully justifying regulation of the cable industry. These other cases apply the scarcity theory described in Red Lion Broadcasting[112] (supporting broadcast regulation) to regulation of cable, even though Red Lion involved physical scarcity. In Community Communications v. Boulder,[113] the court faced the issue of the validity of government regulations dividing the city into districts, each to be served by one cable company. It distinguished cable from newspapers on several grounds, deciding that for regulatory purposes, cable is more analogous to broadcasting since both possess some form of scarcity.[114] However, the court further reasoned that cable is not necessarily subject to the same panoply of regulations as broadcast and remanded for a determination of whether the regulations the government imposed were in fact justified by economic scarcity.[115]

Similarly, in Omega Satellite Products v. Indianapolis,[116] the plaintiff contended that the city violated antitrust laws and the first amendment by granting de facto exclusive licenses. The court relied on the reasoning articulated in Boulder that economic scarcity is sufficient justification for governmental regulation[117] to justify more stringent regulation of cable.

Even if the cable industry were characterized by economic scarcity, such scarcity should not serve as a regulatory rationale. First, it is inappropriate to equate economic scarcity with the physical scarcity used to justify broadcast regulation. Physical scarcity serves to allow regulations that alleviate the difficulties caused by such scarcity--interference among too

many speakers and monopolization of expressed viewpoints. It does not, however, authorize pervasive regulatory schemes. Indeed, in Federal Communications Commission v. League of Women Voters, the Supreme Court affirmed the position that the first amendment prohibits regulations, even those rationalized by physical scarcity, unless they serve first amendment values specifically by promoting diversity. As physical scarcity only justifies those regulations that solve problems caused by physical scarcity, economic scarcity should only permit at most regulations that would ease the difficulties it causes directly.[118] Accordingly, regulations might conceivably prevent outrageously high rates or unfair contract terms with consumers.[119] However, economic scarcity would not justify, for example, rules requiring a cable operator to service every home in the community. A different rationale would be necessary to justify broader regulations.

Second, cable operators carry many channels of retransmitted programming. As retransmitted network programming already must comply with the established FCC reply and fairness doctrines, there is less of a need for regulation promoting diversity than in the broadcast media.

Third, economic scarcity has already been rejected by the Supreme Court--in Miami Herald Publishing Company v. Tornillo--as a regulatory rationale with respect to newspapers, even though the evidence in that case demonstrated that it is economically more feasible to purchase a broadcast station than to begin a newspaper operation.[120] The Court refused to equate economic and physical scarcity as equivalent rationales for bypassing constitutional protections.

Thus, economic scarcity should be rejected as justification for cable regulation both because there is insufficient proof that it presents a problem and because, even if it does exist, there is an insufficient basis for equating it with physical scarcity as a constitutionally valid rationale for regulation of a first amendment protected medium.

4. Use of streets. A third reason cited as justification for cable regulation is the government's right to regulate cable's use of public streets.[121] Because government has a right to regulate the use of public streets and rights of way, the argument goes, the government may also regulate the industries that use the streets or rights of way.[122] A related argument is that if the government may grant a license to those who use public streets, it may condition acquisition of the license on fulfillment of various conditions.[123]

While it is true that a cable system must use public streets,[124] and that government has the power to regulate such use,[125] it does not follow that government can use its power to regulate every aspect of the cable industry.[126] While the Supreme Court has recognized the government's power to impose reasonable regulations on the time, place and manner in which public streets will be used, it has consistently rejected governmental attempts to expand that power to regulate protected first amendment interests.[127]

In fact, broadcasting has been the only area in which the Supreme Court has permitted regulatory discretion to intervene in the licensing process, even though a broadcaster's freedoms of speech and press are implicated. Broadcast licenses are granted only where in the "public interest, convenience or necessity."[128] In any other medium of speech or press, such regulatory discretion is unconstitutional.[129] The distinction between broadcasting and other speech is based upon the need to allocate a few broadcast frequencies among many applicants, and the resulting public trustee status of the few who receive licenses.[130] It is not founded upon the broadcasters' use of public airwaves, since other licensed or time-place-manner-restricted speakers use public property but cannot be regulated to the same degree as broadcasters. Because cable does not involve such an allocation of a "few" among the "many,"

cable should not be subject to broadcast-type regulation.[131] Rather, cable's use of public streets subjects it to no more than the standard time-place-manner analysis applied to other public speech.

A license to use public streets is a reasonable time, place and manner restriction so long as the grant of the license is founded upon sufficiently objective standards such that first amendment rights are not infringed.[132] While a government may impose reasonable health or safety based regulations regarding stringing of cable through public streets, it does not, merely because cable operators need a license to begin operations, possess the power to impose restrictions that interfere with cable's first amendment rights. Use of public streets is not a blanket justification for any regulation the government deems necessary.[133]

In conclusion, cable as a medium falls neither into the newspaper nor broadcasting categories, and therefore cannot be treated identically to either for regulatory purposes. Nevertheless, the Constitution requires that compelling justification exist for limiting or regulating cable's first amendment interests. The attributes of broadcasting that justify greater regulation generally do not apply to cable because cable is not a physically scarce medium. Economic scarcity, even if proved to exist, also fails to support intrusive regulation of cable. The only types of regulation that economic scarcity would justify are those pertaining to the problems directly imposed by economic scarcity; a more pervasive regulatory scheme would be unsupportable.

Similarly, although cable's use of public streets entitles the government to impose limited time, place and manner restrictions, that use does not authorize arbitrary licensing procedures or other first amendment infringements. The theory that government may impose conditions that infringe consti-

tutional rights based upon cable's use of public streets is unfounded. Requiring cable operators to agree to conditions that interfere with editorial discretion, or that otherwise effectively abridge their first amendment rights, is highly suspect.[134] By basing a franchise grant upon an operator's agreement to do that which it would not otherwise do, the government implicates important constitutional safeguards.[135]

In the absence of special justification provided by one or more of the foregoing theories--physical scarcity, economic scarcity or use of public streets--, any cable regulation that implicates free speech values may be invalid under traditional first amendment scrutiny. Physical scarcity does not accurately characterize the cable medium and hence should not be used to justify broadcast-type regulation of cable. Use of public streets on the other hand, clearly justifies reasonable time, place and manner restrictions on construction and use of underground or overhead conduits by cable operators. Somewhere in the middle of these two extremes is economic scarcity, which if proven to exist, might justify regulations directed solely at easing the conditions caused by such scarcity without impinging unnecessarily on cable's first amendment rights.

The proper analysis of a specific cable regulation requires first a determination whether first amendment values are implicated. If so, the nature of the government interest behind the regulation must be identified and its significance compared with the three theories discussed in this section. Finally, if the government interest is indeed valid and substantial, the regulation must further satisfy the requirement that it achieve that goal in a manner which least restricts the first amendment rights of the cable operator.

III. ANTI-CREAM-SKIMMING RULES AND THE FIRST AMENDMENT

In 1972, the FCC established certain guidelines for the cable industry,[136] including a directive that local governments provide for cable service to the poorer, as well as more affluent, communities.[137] The practice of cable operators to service only the more profitable areas in a locale is known as cream-skimming.[138] Pursuant to the FCC directive, some franchising authorities have tried to eliminate cream-skimming.[139] New York, for example, has provided that the commission in charge of the franchising process may require extension of cable service to poorer areas even if such an extension would be economically unfeasible.[140] In accordance with the statute, New York City undertook to franchise the city by sections.[141] In applications for a franchise for the Bronx, the New York commission required that cable operators service the entire borough, which includes some of the city's poorest areas. As a consequence of that requirement, only two companies applied for the Bronx franchise, whereas numerous operators applied to service Brooklyn, Queens and Staten Island, far more prosperous boroughs.[142] In addition, Section 621(3) of the Telecommunications Act of 1984 provides for anti-cream-skimming requirements by local franchising authorities.[143]

The FCC directive and federal, state and local legislation responsive thereto indicate that governmental efforts are directed toward eliminating cable's tendency, as a for-profit enterprise, to cream-skim or serve more affluent areas rather than the poorer ones. Although anti-cream-skimming efforts raise a number of questions, the remainder of this Article will focus only on the effect of anti-cream-skimming legislation on cable's first amendment rights.[144] First, the Article will examine how anti-cream-skimming provisions affect cable's first amendment freedoms. It shall then apply the appropriate scrutiny to determine the validity of the legislative provisions.

There are two ways in which legislation may impinge upon first amendment rights--by discriminating on the basis of content, or by directly affecting first amendment rights even though the legislation at issue is content neutral.[145] If the regulation discriminates by content, it is invalid unless the speech falls within a category that is outside the protection of the first amendment.[146] On the other hand, if the regulation is content-neutral but nevertheless impinges upon protected first amendment rights, the regulation will be sustained if the government can meet the following two-pronged test: (1) the regulation protects a substantial governmental interest that is unrelated to the suppression of expression, and (2) there are no less infringing alternatives that can adequately protect that interest.[147] The courts perform a balancing test in assessing the regulation's validity, with a "thumb upon the scale"[148] preferring the first amendment interests at stake even if the government did not intend to affect speech.[149] Under that balancing test, the challenged legislation will be sustained if it is a valid time-place-manner restriction, a permissible subject matter regulation, or a narrowly-drawn regulation justified by a proper state interest.[150]

A. Are Cable's First Amendment Rights Implicated?

There are several ways in which anti-cream skimming regulations, by requiring cable operators to expend sums and to service areas that they would not otherwise choose, directly impinge upon first amendment values.

1. Affirmative duty. Anti-cream skimming legislation requires cable operators to service all areas in exchange for a franchise to service any. The legislation thus places an affirmative duty on operators. Unless they comply with the requirements, operators will be prohibited from speaking or publishing information via the cable medium in that locale. By placing an affirmative duty on prospective speakers, the legislation necessarily cuts off

some speech. The consequence of cutting off speech has been condemned by the Supreme Court as infringing upon first amendment rights.[151]

2. Exclusion of certain operators. An offshoot of the preceding impingement is the exclusion of esoteric operators that appeal to only a small segment of the audience. Anti-cream-skimming regulations effectively bar access of small or esoteric operators to the marketplace.[152] Since the government may not validly bar small operators from the market, even to ensure access by all residents to cable programming,[153] such regulations implicate the first amendment rights of small or esoteric operators.

3. Diversion of funds. By requiring the expenditure of funds upon wiring all areas of a community, franchise authorities divert funds away from cable programming, a protected form of speech.[154] A limit on the extent of speech is just as invalid as a restriction on the manner of speech. In Buckley v. Valeo,[155] the Supreme Court held unconstitutional a limit on political campaign expenditures because it reduced the quantity of speech that could be made.[156] The Court explained: "money is a neutral element not always associated with speech but a necessary and integral part of many, perhaps most, forms of communication."[157] A requirement causing cable operators to limit the funds spent on programming because the funds must be allocated to service may well be invalid for the reasons expressed in Buckley v. Valeo.

4. Editorial discretion. By mandating that cable operators serve all areas of a particular locale, legislation interferes with the editorial freedom to publish or speak to whatever audience a speaker chooses.[158] In Miami Herald Publishing Company v. Tornillo,[159] the Supreme Court rejected imposition of a right of reply upon newspapers because "any...compulsion to publish that which '"reason" tells them should not be published' is

unconstitutional."[160] Although Tornillo concerned newspaper regulation, the principles enunciated apply by analogy to anti-cream-skimming legislation. Broadcasters also possess a similar right to control the editorial content of their programming. In Federal Communications Commission v. League of Women Voters,[161] the Supreme Court invalidated on first amendment grounds federal legislation that prohibited editorializing on public broadcast systems.[162] The Court recognized the position of editorial expression at the core of first amendment-protected values.[163] In Midwest Video v. Federal Communications Commission,[164] the District of Columbia Circuit Court found a comparable right of cable operators to editorial discretion.[165] Although the decision involved mandatory public access to cable channels, the overriding principle is that cable systems have a right to editorial control over their publication. In other contexts, courts have held that denial of a speaker's chosen audience negates the impact of the speech and is accordingly unconstitutional.[166] Consequently, a regulation that interferes with editorial discretion by mandating to whom information or entertainment must be supplied also raises a prima facie question of validity under the first amendment.[167]

5. Discriminatory tax. A requirement that cable alone, and not other non-essential industries, service all areas within a particular geographic locale may be equivalent in effect to a discriminatory tax.[168] Discriminatory taxes are unconstitutional when applied to a medium protected by the first amendment.[169] In Minneapolis Star and Tribune v. Minnesota Commissioner of Revenue,[170] for example the Supreme Court held unconstitutional a use tax that applied only to materials used in printing newspapers. Although newspapers are subject to economic regulations applicable to other industries, the tax in issue was invalid because it was "facially discriminatory, singling out

publications for treatment that is...unique in Minnesota tax law."[171] Moreover, the government failed to meet the burden necessary to establish constitutionality because "[a] tax that burdens rights protected by the first amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest."[172] Since cable is singled out for special treatment by being required to extend service to all whom government sees fit, such regulation arguably constitutes a discriminatory tax.

6. License fee. Closely related to the discriminatory tax effect is the excessive financial burden imposed by anti-cream-skimming regulations on cablecasters for use of public streets to exercise their first amendment rights. This financial burden arising out of undesired extra construction costs is equivalent to a license fee which may constitutionally impact upon first amendment freedoms unless it bears a reasonable relationship to the government cost of a regulatory system.[173] Courts have consistently struck down license fees imposed upon the press or other speakers unless the fee is a "nominal fee imposed as a regulatory measure to defray the expenses of policing the activity in question."[174] Although in each such case, the government contended it had a sufficient reason for imposing the fee,[175] the courts compared the amount of the fee to the actual expenses in policing the expressive activity for which the fee was imposed, concluding that the fee was excessive for that purpose. Thus, while the government can impose a reasonable fee upon cable to ease expenses in administering cable-laying operations, excess financial expenditures or burdensome conditions upon cable are potentially subject to invalidation as an unlawful requirement for the exercise of first amendment rights.[176]

Anti-cream-skimming regulation may well implicate cable's distribution, editorial and idea-exchange functions[177] in all of the various manners dis-

cussed above. Since any one of those impingement effects is sufficient to trigger scrutiny under the first amendment, the inquiry turns to whether anti-cream-skimming regulation serves a substantial government interest.

B. What Substantial Governmental Interest is Served?

In any of the ways just discussed, anti-cream-skimming regulation is content-neutral in its effect on cable's first amendment rights.[178] Accordingly, the two-pronged balancing approach applies: to sustain the regulation, it must be established both that the government has a substantial interest underlying the legislation and that the governmental objective is achieved in the least restrictive manner.

The government's interest in the franchise process in general and in preventing cream-skimming in particular must be substantial under the first prong of the test. There are several possible theories to support that interest.

1. Monopolistic industry. Asserted interest in protecting the public from high economic costs associated with a monopoly or from competing operations in an economic environment capable of supporting only one system would appear significant. As earlier discussed, however, there is no evidence to suggest that physical or economic factors dictate the viability of only one cable system in a given area.[179] Unlike the broadcast media where a physically tangible limit on the number of electromagnetic frequencies justifies governmental intervention both to allocate those frequencies and to promote diversified programming within each of the allocated stations, cable does not suffer from a comparable physical handicap to justify similarly intrusive regulation. Economic scarcity that would justify regulation of some sort has not been shown to exist; however, even if it were shown that economic factors created such a natural monopoly, it remains unclear what substantial govern-

mental interest is served by enhancing television reception of and providing non-broadcast programming to everyone in the community through such anti-cream-skimming regulation. While government may have a legitimate interest in controlling the provision of essential services to its citizens through establishment of natural-monopoly utilities,[180] cable is no more essential than newspapers in terms of meriting a governmental requirement that everyone be supplied with the newspaper (or a cable feed) on a daily basis.

2. Use of public streets. It is commonly argued that regulation of cable is necessitated by cable's use of public streets and public ways.[181] The Supreme Court and lower federal courts have consistently recognized that government has a substantial interest in regulating the use of streets for reasons of public health and safety.[182] However, where a prospective speaker seeks to use a public forum to express his or her views, there is also a right of public access, sharply circumscribing the state's police power in this area.[183] If cable uses a public forum, then, the government's power to restrict cable speech is correspondingly narrower than if no public forum were involved.[184] In Hague v. CIO,[185] the Supreme Court stressed the importance of the public forum characterization:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.... The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all;...but it must not, in the guise of regulation, be abridged or denied.[186]

Public streets are the traditional public forum.[187] They have historically been used for the expression of ideas through pure speech[188] and speech-related conduct.[189] Non-traditional forms of information dissemination on public fora are also protected activities.[190] Cable, however, uses underground ducts or utility poles for placement of the cable by which they transmit speech, perhaps requiring a differentiation of these areas from the public places that are recognized as public fora. A threshold question thus arises whether the publicly-owned areas that cable uses are a public forum.

a. Public forum status. Public forum characterization comes about in one of two ways: either a place has always been held in trust for public use,[191] or the government has made public property available for expressive activity.[192] In making this determination, a forum's special attributes must be considered.[193] Thus, the Supreme Court has held streets and parks to be a public forum,[194] but has held to the contrary with respect to a state fairground,[195] a city-owned rapid transit vehicle,[196] a military base,[197] and the public mails.[198] Other courts have found newsboxes,[199] a bus terminal[200] and the interior of the state legislature[201] entitled to public forum status. Amidst this spectrum of possible fora, cable's use of conduits underneath public streets suggests that public forum status is appropriate under either of the tests set forth above.

First, streets are traditional public fora historically used by the public for expression of ideas. Although cable's underground use of the streets is non-traditional, courts have not hesitated to consider other non-traditional street use as use of a public forum.[202] A decisive factor in this analysis is whether "the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[203] Use of underground conduits for communication of speech is not incompatible with the

normal activity of the place--transmission of telephone cables, gas, electric and waterlines and sewer and subway systems--precisely because the conduits are already being used in the same manner for other pipes and wires.[204] Disruption of normal street activity by construction will generally be infrequent, similar to that occasioned by utility companies.[205] In any event, the government's legitimate interest in controlling such disruption is more appropriately addressed by the imposition of valid time, place and manner restrictions (discussed below) and not by denying public forum status to under-street conduits.

Using the second test of public forum status,[206] underground conduits should be treated as a public forum for cable's use because government has already made these places available for cable use.[207] Although government has conditioned such use upon various contractual undertakings,[208] states and municipalities have allowed cable operators to access these underground areas.[209] Thus, the government has in fact created a public forum, even if one did not previously exist, by opening up the underground conduits to cable.

Classifying underground conduits as a public forum does not result in a prohibition of all regulations. The government retains the power to enact reasonable time, place and manner restrictions to ensure that public health, safety or convenience is not adversely affected by the laying of cables.[210] However, it may not regulate more than necessary to protect those interests.[211] Accordingly, the only permissible "substantial interest" that government may have in regulating cable's use of a public forum is in imposing reasonable time, place and manner restrictions on cable's activities. To protect the public well-being, for example, it may restrict the manner and time of construction, dictate the place of construction and possibly the location of cable's operating facilities. However, government may not, under

the guise of enacting time, place or manner restrictions, regulate cable's first amendment activities,[212] nor may it use the power to impose such restrictions as a jumping off point to indulge in regulation having no relation to the original justification--the public interest in overseeing use of the streets.[213]

As earlier noted, it is unclear why government should have an interest in ensuring that all homes in the community are provided access to cable services, since clearly there is no comparable interest in having each household receive a copy of the daily newspaper. It would appear, rather, that the legitimate governmental interest served by anti-cream-skimming regulation is to minimize the disruption to use of streets that would be caused by numerous piecemeal cable-laying operations. In other words, by requiring a cable operator to wire the entire community, government arguably serves a significant interest in minimizing both interference with traffic flow and the administrative expenses associated with permitting cable operators to access the underground and overhead conduits.

b. Nonpublic forum status. If underground and overhead conduits are instead considered a nonpublic forum, government regulations pertaining to use of those areas will be sustained if they are "reasonable in light of the purpose which the forum at issue serves."[214] Use of a nonpublic forum may be restricted to activities compatible with the forum's intended purposes.[215] As to nonpublic fora, therefore, government may have a valid interest in restricting first amendment rights where the exercise of those rights is incompatible with the forum involved.

Even assuming that underground and overhead conduits are not public fora, anti-cream-skimming regulation does not appear to serve a substantial governmental interest.[216] Use of those areas for the placement of cable is consis-

tent with their intended purpose--a repository for placement of service lines and systems for the public benefit.[217] Since many types of cables and systems already exist underground and overhead, it would be preposterous to claim that addition of other cables would be incompatible with the intended purpose of those areas.[218] Thus, while government can regulate more intrusively with respect to nonpublic fora, no valid interest in excluding incompatible uses is served by anti-cream-skimming regulation that requires a cable operator to wire an entire community. Classification of the underground and overhead conduits as a non-public forum therefore does not ease the government's burden in establishing a substantial interest as support for such restrictions.

3. The public's right-to-know. The government's professed interest in providing cable to all prospective recipients is commendable, though not necessarily sufficiently substantial to justify regulations that infringe the first amendment. New York State, in support of cable franchising and anti-cream-skimming legislation, has argued that "New York's interest...is to ensure broad and equal access to cable service [by having local governmental entities] establish franchise areas which ensure that poor neighborhoods, as well as affluent areas, receive cable service."[219] Although there is a recognized public right to receive information,[220] that interest is insufficient to support affirmative obligations imposed upon the press or other media to accommodate that interest.[221] As earlier discussed, broadcast is the sole exception, where physical scarcity justifies a requirement that broadcasters present diversified views fairly in matters of public interest.[222] However, because cable's attributes are sufficiently distinct from those of broadcast,[223] the government's honorable interest in providing access to the population at large will not support anti-cream skimming legislation any more than it would support mandatory routing of newspapers for easy access by every urban or rural resident.224

The substantiality of the government's interest in enhancing the public's right to know via anti-cream-skimming rules is further weakened by the principle that one's first amendment interests may not be abridged simply to enhance those of another. In Buckley v. Valeo,[225] for example, the Supreme Court struck down as unconstitutional a limit on campaign expenditures. Although the government sought to justify the limits by contending that they equalized political campaign voices, the Court rejected this reasoning: "The concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is foreign to the first amendment."[226] The same principle would seem to apply to government regulation designed to enhance first amendment rights of listeners at the expense of the cable operators' freedom both to select an audience and to allocate limited funds to chosen programming. The government oversteps its power in creating such limitations in order to benefit selected recipients of cable.[227] The asserted interest in benefiting the public by presenting cable-transmitted information to a wider audience than that chosen by a cable operator does not appear to be substantial in the required constitutional sense.[228]

In sum, anti-cream-skimming rules appear to serve governmental interests in controlling monopolistic effects, regulating the time, place and manner of cable-laying operations, and enhancing the public's right to receive information. While these goals may be commendable in isolation, when weighed against the competing first amendment rights of cable operators they pale in comparison. Monopoly effects remain largely unproven and anti-cream-skimming rules are as likely to enhance such effects as to alleviate them. Similarly, the public's right to know may be a useful argument for striking down regulation that inhibits wide dissemination, but it is more dubious as a justification for imposing expensive duties upon cable operators that affect choice of

audience and programming. Finally, while government has a legitimate interest in orderly administration of and minimal disruption caused by cable-laying operations, that interest must be served in a manner that least restricts the first amendment rights of operators.

C. Are Anti-Cream-Skimming Rules the Least Restrictive Alternative?

In addition to the requirement that government have a substantial interest in regulating activities that impinge on first amendment interests, it must also demonstrate that it cannot protect the asserted interests in a less infringing manner.[229] There must be no alternative methods that would "more precisely and narrowly assure" satisfaction of the substantial government interest.[230] As earlier discussed, the government has a substantial interest in regulating the use of public streets;[231] however, anti-cream-skimming legislation is not the least restrictive method in which that interest may be protected. Rather, the legislation is an overly broad means of satisfying the governmental interest, with significant adverse effects on first amendment rights of cable operators.

First, the legislation is not a time, place, or manner restriction at all. A proper time, place, or manner restriction would protect the asserted government interest, yet be tailored to allow the proposed speaker to communicate through alternative avenues.[232] In contrast, anti-cream-skimming legislation coupled with franchise requirements regulates more than the time, place, or manner of cable-laying operations. Indeed, the rules do not address cable-laying at all but instead impose an obligation to wire an entire community in exchange for a license to wire any homes located therein. Nor does it leave open ample alternative avenues of communication,[233] because a cable operator is completely barred from transmission in the area unless it complies with those compulsory conditions. By requiring cable to serve everyone in

order to serve anyone, and by consequently creating the possibility of a total ban on potential cable expression,[234] anti-cream-skimming regulations are significantly broader than the type of regulations accepted as valid time, place or manner restrictions.[235] The regulations thus fail as narrowly-drawn time, place or manner regulations.

Second, the government-sponsored option of either mandatory service to all community residents or no service to anyone is not the least restrictive method of providing all residents with cable television since it infringes first amendment rights of cable operators.[236] Anti-cream-skimming legislation is far too onerous to constitute the least restrictive means of achieving the governmental objective.[237] By unnecessarily interfering with first amendment values, the legislation is therefore overbroad.[238] It would cause significantly less intrusion into the first amendment if, for example, the government entity interested in providing community-wide access to cable service paid a subsidy either to individuals to cover the extra wiring costs or to cable operators who would then not be penalized financially by extending community-wide service.[239] Alternatively, the government might itself charge a fee to cable subscribers or assess a tax on all residents to cover cable costs in serving unprofitable localities.[240] Thus, there are numerous methods available to the government by which the interest of extending cable service to all residents could be satisfied while preserving inviolate the first amendment freedom of the cable operator to service a given locale without outside interference.[241]

IV. CONCLUSION

Recent technological advances have made cable an attractive service both for consumers and for the governmental entities that oversee cable operations

and collect franchise fees. Government efforts to ease their own administrative burden by anti-cream-skimming rules requiring licensed operators to wire entire communities raise significant questions under the first amendment. Such a costly requirement impedes the flow of cable-transmitted free speech by imposing an affirmative duty on prospective speakers, excluding esoteric operators, diverting funds from programming to construction costs, interfering with an operator's choice of audience, and operating as a discriminatory tax on or license fee for the exercise of protected speech.

The asserted justification for anti-cream-skimming regulation stems both from the perception of the cable medium as physically or economically scarce and from cable's use of public streets as a conduit for the transmission of programs. Unlike the broadcast media, however, cable cannot be characterized by physical scarcity since channel and program capacity is far greater. Economic scarcity has yet to be established as fact, but even assuming its presence the government has little business seizing control of and fostering monopolies in such a non-essential service as cable. Use of public streets as conduits does justify governmental involvement for controlling the time, place and manner of cable-laying operations, but does not authorize more pervasive regulation that interferes with cable's first amendment freedoms.

Under traditional first amendment analysis, anti-cream-skimming rules are content-neutral and therefore require application of a two-pronged test under which the regulation is sustained if it serves a substantial governmental interest and achieves that interest in the least restrictive manner. The first prong arguably is satisfied by the government's interest in minimizing cost and disruption to traffic occasioned by multiple cable-laying operators, as well as an interest in ensuring inexpensive cable service for all its residents. Anti-cream-skimming rules do not address cable-laying operations at

all, however, and hence cannot be upheld as the least restrictive manner of minimizing disruption of public streets. Further, while the government's interest in providing for cheap community-wide cable service may be commendable, there are other ways of seeing that all citizens benefit from this non-essential service that intrude far less into the pocketbooks and free-speech domains of cable operators. Government subsidies or a community-wide tax assessment--subject to the usual checks of voter participation--come to mind as more appropriate allocations of the costs involved in creating a fully cable-wired community.

In sum, anti-cream-skimming rules are highly suspect under evolving first amendment doctrine, and should not be permitted to proliferate unchallenged by prospective cable-speakers. Powerful arguments can be raised against those rules--and other aspects of exclusive franchising systems--because of the profound impact they have on the most significant growing area of communication in American society today. More importantly, in resolving these and other questions involving first amendment rights of cable, the courts should not blindly identify cable with the broadcast media--on the basis of facial similarities--to justify intrusive regulations that will effectively determine available programming options for years to come.

1. ICR, Titsch Communications estimated in March 1984 that there are 30.7 million basic cable subscribers. Paul Kagan Associates estimated a figure of 31.36 million cable subscribers on December 31, 1983. NCTVA, Cable TV Developments, September 1984. ICR's figures were published in Cablevision, April 30, 1984.
2. Over-the-air broadcasting refers to television broadcasters that transmit their signals via electromagnetic waves through the air.
3. HBO v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); Senate Report to S. 66, 98th Cong., 1st Sess. 5 (1983) [hereinafter cited as Senate Report]. ICR, Titsch Communications estimated a penetration rate of 56.4% of the 54.5 million homes passed by cable (or 36.7% of the 83.775 million television households) in March 1984. In Television Digest, 1984 Television Factbook, services volume, it was estimated that as of January 1, 1984, the penetration rate is 30 million homes (35.7% of the 83,971 million television homes). See NCTVA, Cable Television Developments, September 1984.
4. Id. at 22 (footnotes omitted). Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694, 2701 (1984) ("[C]able operators provide their customers with a variety of broadcast and non-broadcast signals obtained from several sources...[including] over-the-air broadcast signals picked up by a master antenna...[or] imported by means of communications satellites, and non-broadcast signals that are...transmitted specifically for cable systems by satellite or microwave relay."). Cable provides inter alia locally originated information and entertainment, proceedings of both Congressional houses, 24-hour news channels, health, children's, sports and religious programming. Senate Report, supra note 3, at 5.

5. There have recently been discussions of future contributions of laser to the cable industry. In addition to increased channel capacity, recent technological developments have made 2-way interactive systems possible in which the home viewer would be able to order groceries, bank, or perform other tasks. In addition, cable provides potential for fire and theft alarm services. These 2-way interactive systems have triggered substantial discussions of the need for protection of the viewer's privacy. These discussions are beyond the scope of this article.
As cable expanded technologically over the last four decades, other forms of television technologies have also developed. Satellite Master Antenna Television systems (SMATV) rely on a satellite to capture signals and coaxial cable to transmit the signals to television. Similarly, Master Antenna Television systems (MATV) employ a master antenna to receive signals, also transmitting the signals to television via coaxial cable. MATV systems, however, do not involve use of public rights of way.
6. Penetration rate refers to the number of homes cable serves. In 1980, over 4,700 systems and almost 24 million subscribers provided a revenue of over $2.3 billion to the cable industry. Senate Report, supra note 3, at 4-5. It has been estimated that by 1990, cable will serve half of all American homes. Senate Report, supra note 3, at 4-5.
7. When cable merely augmented reception of broadcast television signals, the FCC did not regulate it to a large degree. However, as cable developed technologically, and began providing more services to more homes, the FCC, under substantial pressure from the television broadcast industry, began to regulate cable more heavily. At times, the FCC's regulations were declared invalid as beyond the FCC's jurisdiction or as violative of the first amendment. See, e.g., FCC v. Midwest Video

Corporation, 440 U.S. 689 (1979) (FCC rules requiring cable to provide channels for public access were beyond FCC's jurisdiction); HBO v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977) (FCC rules prohibiting exhibition of certain films to prevent siphoning of the films from broadcast television violated the first amendment). To prevent recurrent inhibition of cable's growth, Congress enacted legislation intended to maximize cable's potential by eliminating unnecessary regulation at the federal, state, and local levels. Telecommunications Act of 1984, S. 66, 98th Cong., 2d Sess. (1984).

8. Senate Report, supra note 3, at 17. The Senate committee stressed that to maximize development, market forces, rather than governmental regulations, should control. Id. at 11, 17. The House amended the bill and passed H.R. 4103, 98th Cong., 2d Sess., on October 1, 1984. The Senate agreed to an amended House version on October 11. Also on October 11, the House passed the Senate-amended version of the House bill S. 66. The legislation is intended to clarify the permissible scope of state and local regulation of the cable industry.

9. See H.R. 4103, supra note 8, S639. The bill provided for imposition of a fine against anyone who "transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States." Thus, it implicitly recognizes cable's first amendment rights. See also Senate Report, supra note 3, at 2.

10. In Preferred Communications, Inc. v. City of Los Angeles, No. 84-5541 (9th Cir. March 1, 1985), the Ninth Circuit, on first amendment grounds, reversed the District Court's dismissal of a cable operator's complaint that Los Angeles' franchise procedure violated the first amendment. The plaintiff cable operator contended that Los Angeles infringed its right

to construct a cable television system free from the City's interference and that the City could not impose conditions upon cable operators' use of public facilities. The court, however, addressed only the narrower question of whether the City, "consistent with the First Amendment, [could] limit access...to a given region of the City to a single cable television company, when the public utility facilities...necessary to the installation and operation of a cable television system are physically capable of accommodating more than one system." Slip op. at 7. The court responded negatively, determining that cable's first amendment rights bar exclusive franchise auction procedures as acceptable means of regulating cable operations and protecting public resources. Id. at 8, 15. See also Century Federal v. Palo Alto, 579 F. Supp. 1553, 1562 (N.D. Calif. 1984) ("We accept ... the proposition that cable operators are entitled to some First Amendment protection"); Berkshire Cablevision v. Burke, 571 F. Supp. 976 (D.R.I. 1983) ("Cable operators are undoubtedly engaged in some forms of speech protected by the First Amendment."); FCC v. Midwest Video, 440 U.S. 689, 709 n.19 (1979) (Although the court reached its holding that the FCC could not impose access rules on cable operators on non-constitutional grounds, it noted that the first amendment issue raised by plaintiffs was not frivolous).

11. See, e.g., Lovell v. Griffin, 303 U.S. 444 (1938), in which the Court, striking down such an ordinance, stated:

> "The ordinance [prohibiting distribution without a license] cannot be saved because it related to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' Ex parte Jackson, 9 U. S. 727, 733."

See also Schneider v. State, 308 U.S. 147, 160 (1939) (Regulation in the public interest "may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.") (emphasis added); Jamison v. Texas, 318 U.S. 413, 416 (1943) (The right to express views in an orderly fashion "extends to the communication of ideas by handbills and literature as well as by the spoken word."). Cf. New York Times v. Sullivan, 376 U.S. 254 (1964). (a newspaper protected by the first amendment even as to the content of ads which were placed in the newspaper by a different entity who controlled the content of the ad); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (ordinance requiring payment of fee for license to distribute pamphlets held unconstitutional; Court implicitly recognized first amendment right of distribution).

12. Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 579 F. Supp. 90, 93 (S.D.N.Y. 1984) ("It has long been settled that the freedoms of speech and press...extend to the distribution of newspapers...."); Southern New Jersey Newspapers v. New Jersey, 542 F. Supp. 173, 183 (D.N.J. 1982) ("In that honor boxes [coin-operated vending machines] play a role in the distribution of plaintiff's newspapers, this court agrees with the position that such devices are entitled to full constitutional protection.") (citations omitted); Miller Newspaper v. Keene, 546 F. Supp. 831, 834 (D.N.H. 1982) ("First Amendment protections are not lost or diminished because the newspapers at issue here are sold rather than distributed freely."); Philadelphia News v. Borough of Swarthmore, 381 F. Supp. 228, 240 (E. D. Pa. 1974) (ordinance banning newsboxes on street held unconstitutional; "[T]he constitutional protection extends to means of distribution of the newspaper as well as to

content and the ideas expressed therein. The Supreme Court has long held that the right to circulation is as essential to the freedom of the press as the right to publish; without circulation, freedom of publication is a mockery.") (citations omitted); Gannett v. Rochester, 330 N.Y.S.2d 648 (Sup. Ct. 1972).

13. Detroit Legal News, July 9, 1984, at 2, col. 3; Goldberg, Ross and Spector, Cable TV, Government Regulation and the First Amendment, 3 Comm./Ent. L.J. 577, 579 (1981); Nadel, A Unified Theory of the First Amendment, 11 Fordham Urban L.J. 163, 166 n.9. (1982-83). This similarity between the function of newspapers and that of cable has blurred the distinction between cable and newspapers, creating implications for the appropriate level of first amendment protection for cable.

14. Berkshire Cablevision v. Burke, 571 F. Supp. 976 (D.R.I. 1983). In Berkshire Cablevision, the state enacted legislation requiring cable operators to set aside a specific number of channels for free access by the public, government or educational institutions. Berkshire challenged the constitutionality of the legislation. Although the court upheld the statute, it recognized that based upon the similarity in editorial function between cable and newspapers and the broadcast media, cable is entitled to first amendment protection. It went on, however, to find that cable compares more closely to broadcast than to the print media, allowing a higher level of government regulation consistent with the first amendment. See infra notes 97 and 100.

15. In Miami Herald Publishing v. Tornillo, 418 U.S. 241, 258 (1974), the Supreme Court, in striking down a statute giving reply time to criticized political candidates, spoke of the need under the first amendment to prevent intrusion into editorial freedom. It stated:

> "[T]he Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decision made as to limitations on the size and content of the paper, and treatment of public issues and public officials--whether fair or unfair--constitute the exercise of editorial control and judgment."

See also FCC v. League of Women Voters, 104 S. Ct. 3106 (1984) (Supreme Court struck down FCC rules prohibiting editorializing by certain public broadcast stations because it interfered with the station's editorial freedom, a basic first amendment right). But see Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969), in which the Supreme Court upheld the FCC's fairness doctrine for broadcasters although the right of reply and fairness rules would implicitly interfere with editorial decisions.

16. See Telecommunications of Key West v. United States, 580 F. Supp. 11, 13 (D.D.C. 1983) ("The court readily accepts TCI's contention that as a provider of cable TV it enjoys the protections of the First Amendment. . . . [W]hile . . . TCI currently produces no original programming ... it has the potential to create original productions and, at the very least, performs the editorial function of choosing which programs of existing broadcasters it will provide to subscribers.") (citation omitted); Omega Satellite Products v. Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982) ("Omega is engaged in the dissemination of speech within the meaning of the First Amendment both by transmitting programs originated by television stations and cable television networks and by originating its own modest programs.").

17. 343 U.S. 495 (1952).

18. Id. at 501.

19. Schad v. Mount Ephraim, 452 U.S. 61 (1981).

20. Berkshire Cablevision v. Burke, 571 F. Supp. 976 (D.R.I. 1983) ("We seek guidance by analogizing to other areas such as newspaper and broadcast journalism where First Amendment concerns have already been addressed."); Omega Satellite Products v. Indianapolis, 694 F.2d 119 (7th Cir. 1982); Community Communication v. Boulder, 660 F.2d 1370 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982).

21. See notes 26-31 infra.

22. See notes 56-72 infra.

23. Berkshire Cablevision v. Burke, 571 F. Supp. 976 (D.R.I. 1983); Community Communications v. Boulder, 660 F.2d 1370 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982).

24. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952).

25. See also Midwest Video v FCC, 571 F.2d 1025 at 1054 (8th Cir. 1978), aff'd on other grounds, 440 U.S. 689 (1979) ("Cablecasting is communicating, requiring thorough and penetrating consideration of the communicator's First Amendment rights") (footnote omitted).

26. 418 U.S. 241 (1974).

27. Id.

28. Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969) (application of right of reply rules and the fairness doctrine to the broadcast media is constitutional).

29. 418 U.S. at 256, 258. The Court stated that "a compulsion to publish that which '"reason" tells them [newspapers] should not be published' is unconstitutional." Id. at 256.

30. 418 U.S. at 256. It was irrelevant to the Court's decision that a newspaper would have the physical space to print both what it wanted and what the statute mandated. Id. Rather, the statute's invalidity arose directly from the conflict between the legislation's publication requirements and the newspaper's editorial discretion.

31. Newspapers, however, are subject to non-discriminatory application of content-neutral legislation enacted in the public interest. Thus, they have been held subject to antitrust laws, Associated Press v. United States, 326 U.S. 1 (1945); labor laws, Associated Press v. NLRB, 301 U.S. 103 (1937), and employment discrimination laws, Pittsburgh Press v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973). Newspapers have also been required to act in accord with such legislation even if the legislation's impact causes economic injury. See Minneapolis Star and Tribune v. Minnesota Comm'r of Revenue, 460 U.S. 575, 1369-70 (1983) (Court noted that newspapers may be constitutionally subject to generally applicable economic regulations; a tax on newspapers is an economic burden but the tax is valid if nondiscriminatory).

The legislation at issue in the preceding cases applied to industry in general. In contrast, legislation aimed discriminatorily at newspapers is constitutionally invalid even though it does not expressly affect content or editorial control. See, e.g., Minneapolis Star and Tribune v. Minneapolis Comm'r of Revenue, 460 U.S. 575 (1983) (discriminatory use tax on certain newspapers); Grosjean v. American Press Co., 297 U.S. 233 (1936) (tax aimed at certain newspapers). See Section III B infra for a discussion of the tests necessary to sustain regulations that infringe upon first amendment interest of the media, and notes 169-73 infra for a discussion of cases that concerned a tax or other economic regulation that discriminated against the press.

32. See notes 56-72 infra.

33. Generally, the regulations to which the broadcast media are subject are enforced to give more strength to important first amendment concerns, rather than to censor content or methods of broadcasts. See infra notes 118, 130 and accompanying text.

34. Red Lion Broadcasting v. FCC, 395 U.S. 367, 376-77 (1969). The Commission was established to allocate radio frequencies among applicants pursuant to "the public `convenience, interest or necessity.'" Id. at 376-77 (quoting from the Radio Act of 1927, 4, 44 Stat. 1163). Prior to the Radio Act of 1927, Congress had enacted the Radio Act of August 13, 1912, which required a license for the operation of any radio apparatus. NBC v. United States, 319 U.S. 190, 210 (1943). By 1924, the Secretary of Commerce began to allocate specified frequencies to radio stations. Id. at 211.

35. By as early as 1929, the Commission required broadcasters to give adequate and fair coverage to public issues, Red Lion, 395 U.S. at 377.

36. The Federal Communications Commission is hereinafter cited as the FCC. The FCC was created by the Communications Act of 1934. 47 U.S.C. §301.

37. In 1949, the FCC described the duties of broadcasters to give fair and adequate coverage to public issues. Red Lion, 395 U.S. at 377. See infra notes 55-57. The duties became known as the Fairness Doctrine. The Supreme Court, in FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978), upheld the FCC's authority to promulgate and enforce such rules in the public interest.

38. Red Lion, 395 U.S. at 387-88. Many of these frequencies are reserved for other uses: amateur operation, aircraft, defense, navigation and police. Id. at 388. Although there have been recent technological improvements

expanding the number of available frequencies, the expansion has not been sufficient to eliminate the scarcity of the airwaves. Red Lion, 395 U.S. at 396-97, 399.

39. NBC v. United States, 319 U.S. at 216; Red Lion, 395 U.S. at 387-88; FCC v. League of Women Voters, 104 S. Ct. 3106, 3116 (1984).

40. NBC v. United States, 319 U.S. at 226; Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969). As the Court stated in Red Lion, "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." Id. at 387. The Court further stated that there is "no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use." Id. at 391. As a corollary to this rationale, the Court found that broadcast licenses confer a privilege of use, rather than ownership of the airwave. Id. at 394.

41. Id. at 388-89, 390, 394; NBC v. United States, 319 U.S. at 227 ("The right of free speech does not include, however, the right to use the facilities of radio without a license."). Accordingly, standards for possession of licenses are also valid. Red Lion, 395 U.S. at 389; FCC v. League of Women Voters, 104 S. Ct. 3106, 3116 (1984); FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978). See infra notes 62-64.

42. In NBC v. United States, 319 U.S. at 226, the Court stated, in rejecting plaintiff's objections to FCC rules, "[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is

subject to governmental regulation." See also Red Lion, 395 U.S. at 389. This view led the Supreme Court to recognize that the regulations are intended to serve "the people as a whole," id. at 390, by protecting "their collective right to have the medium function consistently with the ends and purposes of the first amendment." Id. See also FCC v. League of Women Voters, 104 S. Ct. 3106, 3116 (1984) ("Congress ... has power to regulate the use of this scarce and valuable national resource."); FCC v. National Citizens Committee, 436 U.S. 775, 799 (1975) ("[I]n light of this physical scarcity, government allocation and regulation of broadcast frequencies are essential, as we have often recognized.") (citations omitted).

43. Red Lion, 395 U.S. at 388, 389. "It was ... the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934...." Id. Congress received the final push to enact the Radio Act of 1927 when 200 radio stations who went on the air between July 1926 and February 1927 used any desired frequencies, regardless of interference to others who correspondingly changed to other frequencies, increasing power output at will. "The result was confusion and chaos. With everybody on the air, nobody could be heard." NBC v. United States, 319 U.S. 190, 212 (1943).

44. Red Lion, 395 U.S. at 376 ("Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard.").

45. Red Lion, 395 U.S. at 390; NBC v. United States, 190 U.S. at 216. Thus, the Court has considered broadcasters as a type of trustee or fiduciary who operates the airwaves in trust for the public and accordingly must broadcast with the public interest in diversified speech in mind. The

Court reasoned in Red Lion that "[t]here is nothing in the First Amendment which prevents the government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity be barred from the airwaves." 395 U.S. at 389. The Court iterated this theory in League of Women Voters, 104 S. Ct. at 3116, where it stated that "those who are granted a license to broadcast must serve in a sense as fiduciaries for the public."

46. In Red Lion, the FCC regulations were challenged, inter alia, as an abridgement of the broadcasters' first amendment rights. However, the Supreme Court upheld the regulations as an enhancement of first amendment freedoms. 395 U.S. at 375.

47. FCC v. National Citizens Committee, 436 U.S. 775 (1978).

48. Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969).

49. Id. at 390. The Court further explained, "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial." Id.

50. Id. at 395. FCC rules were promulgated to further the Congressional interest in preventing subordination of the public interest to monopolization of the broadcast industry by a few dominating leaders. Id.

51. 436 U.S. 775 (1978).

52. Id. The FCC barred prospective formation or transfer of newspaper-broadcast combinations in the same community, although it permitted existing combinations to continue in operation (co-located combinations). Id. However, existing combinations in communities where there is co-ownership of a daily newspaper and the only broadcast station (or daily

newspaper and only TV station), were required to divest either the newspaper or broadcast station. Id. The regulations were upheld on both jurisdictional and constitutional grounds.

53. The Court found that the rules neither exceeded the FCC's authority under the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §151 et seq., id. at 796-97, nor were arbitrary or capricious within the meaning of the Administrative Procedure Act, 5 U.S.C. §706(2)(A), id. at 803. The Court rested its constitutional determination on the ability to regulate broadcast media to promote diversification of viewpoints and thus preserve the public interest in free speech. Id. at 799-800.

54. Id. at 800-802, 814. The FCC, in developing the regulations at issue, had determined that newspapers and television have an "effective monopoly" in the "local marketplace of ideas." Id. at 814. In determining that the rules were rational, the Court relied on studies cited by the FCC in which researchers unanimously found that newspapers and TV "are the two most widely utilized media sources for local news and discussion of public affairs." Id. at 815.

55. In FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1980), the Court noted the interest served by the antitrust laws may also be validly furthered by regulations promulgated to further first amendment concerns. It stated that the regulations are "in form quite similar to the prohibitions imposed by Antitrust laws. This Court has held that application of the Antitrust laws to newspapers is not only consistent with, but is actually supportive of the values underlying, the First Amendment." Id. at 800, n.18 (citations omitted). However, the Court rested its decision on first amendment rather than antitrust

grounds because the FCC had relied primarily on first amendment considerations. Id. The Court has, in effect, approved of governmental regulation as a substitute for market forces to promote communications in the public interest and public satisfaction in a more competitive and less restrictive market. Cf. FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) (market forces replace FCC's determinations as to diversity of programming).

56. In addition to those four rationales, the Supreme Court has upheld an FCC regulation based on a "nuisance" theory. In FCC v. Pacifica Foundation, 438 U.S. 726 (1979), the Court confirmed the FCC's power to regulate broadcasts containing indecent language based on two unique characteristics of broadcasting: a pervasive presence incapable of providing warnings of indecency to listeners, and ease of access by children without parental supervision during certain hours. Although the Court affirmed the FCC's authority to regulate based on the facts in Pacifica, more recent court decisions have indicated that the "nuisance" theory of broadcast regulation may be confined to those facts. Thus, subsequent governmental attempts to regulate based on such a theory have been judicially rejected.

The pervasive nature of broadcasting will probably justify greater regulation of broadcasting than of other forms of expression. Regulation of broadcast speech may also rest upon the "captive audience" rationale which bars speakers from bombarding a captive audience with their speech. See, e.g., Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), and the concurring opinion of Justice Douglas (limits on use of advertising space on municipal transportation upheld because patrons considered a receptive audience of advertisers); Kovacs v. Cooper, 336 U.S. 77 (1949)(certain sound trucks forbidden). Thus, Pacifica may only be a variation of a

time, place or manner theory of regulation that is generally applicable to any type of protected speech. See Pacifica, 438 U.S. at 763 ("[T]his majority apparently believes that the FCC's disapproval of Pacifica's afternoon broadcast ... is a permissible time, place and manner regulation.") (Brennan, J., dissenting).

57. 395 U.S. 367 (1969).

58. Id. at 377. The broadcaster must meet this duty at his own expense if sponsorship is unavailable. Id. Similarly, programming must be at the broadcaster's own initiative if other programming cannot be obtained. Id. at 377-78.

59. A public figure is a figure involved in public issues. 395 U.S. at 378.

60. Id.

61. Id. Similar rules applied to newspapers were rejected by the Court in Miami Herald Publishing v. Tornillo, 418 U.S. 241 (1974). The statute there at issue failed to survive the scrutiny required by the first amendment. See also FCC v. League of Women Voters, 104 S. Ct. at 3188 ("[T]he absolute freedom to advocates one's own positions without also presenting opposing viewpoints--a freedom enjoyed, for example, by newspaper publishers and soapbox orators--is denied to broadcasters.").

62. FCC v. League of Women Voters, 104 S. Ct. 3106 (1984); FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981); FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978); Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969).

63. FCC v. League of Women Voters, 104 S. Ct. 3106 (1984).

64. FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) (FCC's decision to allow market forces rather than its own standards determine programming content upheld).

65. See, e.g., Southeastern Promotions v. Conrad, 420 U.S. 546 (1975) (licensing procedure for use of municipal theatre was unconstitutional as a prior restraint because it failed to establish adequate standards; prohibition of immoral productions held impermissible); Joseph Burstyn v. Wilson, 343 U.S. 495 (1952) (licensing procedure allowing denial of licenses for sacrilegious films held unconstitutional); Cantwell v. Connecticut, 310 U.S. 269 (1940) (reversed conviction of Jehovah's Witness for failure to obtain solicitation license); Lovell v. Griffin, 303 U.S. 444 (1938) (ordinance prohibiting distribution of pamphlets without a license is unconstitutional--liberty of press includes pamphlets and leaflets as well as newspapers and periodicals).

The invalidity of the licensing schemes in the preceding cases resulted from lack of objective standards to guide the licensing authority. In contrast to the rather broad "public interest, convenience and necessity" standard for broadcast licenses, only precise standards "susceptible to objective measurement" may be employed in licensing other type of communications. Espinosa v. Rusk, 634 F.2d 477 (10th Cir. 1980), aff'd, 456 U.S. 951 (1982) (quoting Keyshian v. Board of Regents, 385 U.S. 589, 603-04 (1967)). See also FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978) ("[A]lthough other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the commission decides that such an action would serve 'the public interest, convenience and necessity.'") (footnote omitted).

66. 438 U.S. 726 (1978).

67. The FCC thus had the right to consider the offending broadcast when deciding whether the "public interest, convenience or necessity" would be served by a license renewal. The FCC justified its authority to regulate

on four rationales: access by children to radios; the extra privacy interest occurring at home which is also the location of many radio receivers; the possibility of tuning in to an offensive program without warning; and the physical scarcity of the spectrum. 438 U.S. at 731 n.2. The FCC indicated that it did not desire to bar indecent programming. Rather, it desired broadcasters to broadcast offensive material at a time when children would be unlikely to hear it.

68. Id. at 748-49. Although Pacifica argued that the program was preceded by a warning as to content, the Court felt that because the audience is able to tune rapidly in or out of broadcasts, warnings prior to a broadcast would be ineffective protection against offensive programs. See also id. at 758-59 (the difficulty of broadcasting during most hours in reaching willing adults without also reaching children and the ability of broadcasting to assault people in the home justifies differential treatment of the broadcast media for first amendment purposes) (Powell, J., concurring in part).

69. Id. at 749. The Court explained that the ease of children's access to broadcasters, coupled with the government's interest in the "well-being of youth" and parents' claim to authority in the home, support special treatment of indecent broadcast programs. Id. at 749-50 (quoting from Ginsberg v. New York, 390 U.S. 629 (1968)). See also id. at 757 ("In essence, the Commission sought to 'channel' the monologue to hours when the fewest unsupervised children would be exposed to it.") (Powell, J., concurring in part).

70. Id. at 750. The Court stated:

> "The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the

Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant."

But see the dissenting opinion of Justice Brennan, in which he raises the spectre of an "unpalatable ... degree of censorship." 438 U.S. at 771.

71. 438 U.S. at 750 n.28.

72. The Court reiterated the proposition that "it is well-settled that the First Amendment has a special meaning in the broadcasting context." Id. at 742 n.17. It further stated that "of all forms of protection, it is broadcasting that has received the most limited First Amendment protection." Id. at 748.

73. Community Communications v. Boulder, 660 F.2d 1370 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982).

74. Joseph Burstyn v. Wilson, 343 U.S. 495, 503 (1952); Red Lion, 395 U.S. at 386. See also Times Film Corp. v. Chicago, 365 U.S. 43 (1961); Metromedia v. San Diego, 453 U.S. 490, 500-01 (1981) ("This court has often faced the problem of applying the broad principles of the First Amendment to unique forums of expressions....[E]ach method of communicating ideas is a 'law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method.") (footnote and citations omitted; quoting Kovacs v. Cooper, 336 U.S. 77, 97 (1949).

75. See, e.g., Berkshire Cablevision v. Burke, 571 F. Supp. 976 (D.R.I. 1983) ("[We] seek guidance by analogizing to other areas such as newspaper and broadcast journalism where First Amendment concerns have already been addressed.").

76. Omega Satellite Products v. Indianapolis, 694 F.2d 119 (7th Cir. 1982).

77. Community Television v. Roy City, 555 F. Supp. 1164 (D. Utah 1982) (the court noted that there is much more choice with regard to receiving cable telecasts than broadcast).

78. Cable also may possess characteristics of other forms of communication.

79. See supra notes 25-29.

80. This analysis is based on the theory that just as a compelling interest is necessary to validate regulation of protected speech, an equally strong interest must exist to justify limiting first amendment protection. In cases involving limiting protection of speech, only a few categories have no protection--obscenity, defamation, fighting words, and speech that imminently threatens harm. For all other forms of speech, content-based restrictions are almost always held unconstitutional, while content-neutral regulations are unconstitutional unless the regulation is justified by a compelling interest that cannot be met in a less intrusive manner. See Tribe, Constitutional Law §12-2 (1980), for a thorough analysis of this distinction. As Professor Tribe explains, "[i]n order to establish that particular expressive activities are not protected by the first amendment, the defenders of a regulation which is aimed at the communicative impact of the expression have the burden of either coming within one of the narrow categorical exceptions or showing that the regulation is necessary to further a `compelling state interest'" Id. §12-8, at 602.

Thus, unless compelling reasons exist to justify less or no protection, cable should be entitled to the equivalent maximum first amendment protection that a newspaper enjoys. Stated differently, since cable is entitled to some degree of first amendment protection, see supra Part I, and any regulation impinging upon first amendment rights re-

quires a compelling interest, more stringent regulation of cable than newspapers must therefore require a compelling interest.

Even if more stringent regulation of cable is justified on the theory that cable has fewer first amendment rights than the print media, a compelling interest must nevertheless justify lowering the level of rights. Although some forms of speech are not given any first amendment protection, in the first instance a compelling interest must be shown to conclude that no protection exists. Correspondingly, strict scrutiny and a compelling interest are necessary to a determination that cable should be treated differently than newspapers. See HBO v. FCC, 567 F.2d 9, 46 (D.C. Cir. 1977) ("[T]here is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point [first amendment protection].").

In Metromedia v. San Diego, 453 U.S. 490 (1981), the Supreme Court struck down an ordinance banning non-commercial billboards but allowing certain commercial billboards. The Court began from the premise that non-commercial speech was protected by the first amendment even though billboards are a unique media, and found that a sufficiently important governmental interest would be necessary to justify the restriction. Since there was no such important interest, evidenced by the exception of commercial speech from the ban, the ordinance could not stand. See also Consolidated Edison v. PSC, 447 U.S. 530 (1980) (in analyzing the constitutionality of a ban on Con Ed's speech, the Court relied on the traditional method of analysis under the first amendment even though the speech was through a unique forum: Con Ed's billing envelopes). See generally Note, Cable Television and the First Amendment, 71 Colum. L.Rev. 1008, 1017 (1971) ("[T]he question of first amendment standards as applied to government restraints on the various media requires analysis

of possible justifications, based upon individual media attributes.... [T]here is no reason why application of the first amendment cannot take into account the problems peculiar to each specific medium, so long as one can supply a legitimate constitutional rationale for the standard invoked in a particular context."). See also League of Women Voters v. FCC, 547 F. Supp. 379, 384 (C.D. Cal. 1982), aff'd, 104 S. Ct. 3106 (1984) ("Defendant has not brought to the Court's attention any special characteristic of the broadcast media which would justify the application of less stringent First Amendment standards in the present case;" thus, the court rejected the defendant's argument that a standard less stringent than the compelling interest standard should be applied to broadcast media regulations generally).

81. Midwest Video v. FCC, 571 F.2d 1025 (8th Cir. 1978), aff'd on other grounds, 440 U.S. 689 (1979); HBO v. FCC, 567 F.2d 9 (D.C. Cir. 1977); Omega Satellite Products v. Indianapolis, 694 F.2d 119 (7th Cir. 1982) (economic scarcity); Lamb Enterprises v. Toledo Blade, 461 F.2d 506 (6th Cir.) (economic scarcity), cert. denied, 409 U.S. 1001 (1972); Century Federal v. Palo Alto, 579 F. Supp. 1553 (N.D. Cal. 1984) (physical and economic scarcity, use of public property); Telecommunications of Key West v. United States, 580 F. Supp. 11, 14-15 (D.D.C. 1983) (use of non-public forum).

82. HBO v. FCC, 567 F.2d 9 (D.C. Cir. 1977); Community Television v. Roy City, 555 F. Supp. 1164 (D. Utah 1982); Century Federal v. Palo Alto, 579 F. Supp. 1553 (N.D. Cal. 1984).

83. See supra notes 38-42 for a discussion of the physical scarcity rationale as applied to the broadcast media.

84. Century Federal v. Palo Alto, 579 F. Supp. 1553, 1563 (N.D. Cal. 1984) ("[T]here is a material issue of fact as to whether physical scarcity exists.") (footnote omitted). Cf. Community Communications v. Boulder, 660 F.2d 1370 (10th Cir. 1981) (to justify proposed franchise system, city contended that there was physical scarcity by the limit on the amount of cables that could be strung from telephone poles; however, the court did not reach the issue of physical scarcity on the merits), cert. dismissed, 456 U.S. 1001 (1982).

85. Preferred Communications, Inc. v. City of Los Angeles, No. 84-5541, slip op. at 12 (9th Cir. March 1, 1985) (The court, accepting as true plaintiff's allegations that utility poles and conduits have space available for use by cable operators, found that "the physical scarcity that could justify increased regulation of cable operations does not exist in this case."); HBO v. FCC, 567 F.2d 9, 14 (D.C. Cir. 1977) ("The conflict among speakers using the electromagnetic spectrum which justified Commission regulation [in two broadcast cases] is absent from cable television....[F]or this reason, the conventional justification for Commission regulation of broadcast speakers cannot be applied to regulation of cable television."); Community Television v. Roy City, 555 F. Supp. 1164, 1168 (1982) ("[A]t least in theory, [there is] no physical limitation on the number of wires available to carry electronic signals."). Cf. Omega Satellite Products v. Indianapolis, 694 F.2d 119 (7th Cir. 1982) (although the court recognized that there is no need to regulate broadcast frequencies in cable to prevent interference, it stated that cable does involve interference among users of telephone poles and underground ducts); Telecommunications of Key West v. United States, 580 F. Supp. 11 (D.D.C. 1983) (although government military base would not

physically accommodate more than one cable on utility poles, court focused its analysis on considerations unique to a military base).

In Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968), the court found that FCC regulation of cable was justified for the same reasons relied on by the Supreme Court in justifying FCC regulation of radio in NBC v. United States, 319 U.S. 190 (1943); i.e., physical scarcity of the electromagnetic spectrum. However, cable technology and programming has changed significantly since the Black Hills decision in 1968. In addition, several cases have rejected Black Hills as authority for equivalent regulation of cable and broadcast based upon a theory of physical scarcity. See, e.g., Preferred Communications, Inc. v. City of Los Angeles, No. 84-5541, slip op. at 11-12 (9th Cir. March 1, 1985); Century Federal v. Palo Alto, 579 F. Supp. 1553, 1563 n.19 (N.D. Cal. 1984); Midwest Video, 571 F.2d at 1056 ("If the Commission has any authority to intrude upon the First Amendment rights of cable operators, that authority ... is less, not greater than its authority to intrude upon the First Amendment rights of broadcasters") (FCC failed to produce evidence justifying different treatment of cable than of newspapers at least as to public access); HBO v. FCC, 567 F.2d 45 n.80 (D.C. Cir. 1977) (court rejected application of Black Hills and similar cases finding physical scarcity).

In Paramus, New Jersey, two cable companies operated in the same locale. They both placed their coaxial cables on overground poles although approximately 2.2% of the poles had to be replaced because of the dual cable stringing, there nevertheless was not a shortage of available pole space. See Cable TV Regulation, October 6, 1980; No. I25

at 1. Similarly, the two cable companies competing in Allentown, Pennsylvania use some of the same overground poles. Multichannel News, May 3, 1982 at 54.

86. Preferred Communications, Inc. v. City of Los Angeles, No. 84-5541, slip op. at 11, 16 (9th Cir. March 1, 1985) (the court rejected the City's argument that undetermined physical limitations on utility poles or through conduits are equivalent to the physical scarcity of the electromagnetic spectrum; nor had the City even alleged that public utility facilities that it owned or controlled could support the use of only a single or a few cables); Midwest Video v. FCC, 571 F.2d at 1036 n.23 ([T]he cable "system employs no frequency of the broadcast spectrum to cablecast, and ... sends transmissions only to its own specific subscribers and not into the airwaves.").

87. In HBO v. FCC, 567 F.2d 9, 44-45 (D.C. Cir. 1977), the court rejected the theory that regulation of cable could be supported by the rationale applied in Red Lion to broadcasters:

> "Interference among speakers on a single cable is controlled by electric equipment which divides the cable into channels and by the owners of the cable system who determine who shall have access to each channel and for how long. Nor is there any apparent physical scarcity of channels relative to the number of persons who may seek access to the cable system."

88. Century Federal v. Palo Alto, 579 F. Supp. 1553 (N.D. Cal. 1984); Telecommunications of Key West v. United States 580 F. Supp. II (D.D.C. 1983) But see T.V. Signal v. AT&T, 617 F.2d 1302 (8th Cir. 1980) (telephone poles have room for at least two cables).

89. In Century Federal, the court raised the issue of this kind of physical limitation, but noted that it was factually unsupported.

90. 418 U.S. 241.

91. See supra note 25.

92. 418 U.S. at 257.

93. See Note, Access and Pay Cable Rates--Off Limits to Regulators After Midwest Video II, 16 Colum. J. Law and Soc. Prob. 591 (1981).

94. FCC v. League of Women Voters, 52 U.S.L.W. 5008 (July 2, 1984). See also Community Communications v. Boulder, 496 F. Supp. 823, 828 (1980) ("There is little in this record to suggest that the objective of achieving diversity in programming and sources will be served by a districting ordinance which prohibits the plaintiff from conducting business in the area reserved by others."), rev'd on other grounds, 660 F.2d 1370 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982).

95. This is similar to the monopolization rationale that supports regulation of the broadcast media. There, however, the monopoly protected against derives from allocation of the airwaves to only a few applicants, necessitated by the physical scarcity of the frequencies by which the broadcast media operate. Broadcast monopolies are thus government-created to reflect real physical limitations. In contrast, any monopolization that occurs through exclusive franchises in the cable system results from a municipality's choice to allow only one operator to wire the entire locality. In each case, however, the government speciously contends that since there is only one or a few (in the case of broadcast) speakers, it may justifiably regulate to be certain those speakers are the best for the public. See, e.g., Community Communications v. Boulder, 660 F.2d at 1379. See also Note, supra note 80, at 1017.

96. See, e.g., HBO v. FCC, 567 F.2d at 46 (D.C. Cir. 1977) ("[T]here is some evidence that local distribution of cable signals is a natural economic monopoly...[however,] there is no readily apparent barrier of physical or electrical interference to operation of a number of cable systems in a given locality."); Community Communications v. Boulder, 660 F.2d 1370 (10th Cir. 1981) (court relied on government's contentions that cable is a natural monopoly; however, it remanded for a determination of the degree of scarcity), cert. dismissed, 456 U.S. 1001 (1982). But see Community Communications v. Boulder, 496 F. Supp. at 830, in which the district court, referring to the government's contentions that cable is a natural monopoly, stated: "the city council has persuaded itself that cable television is a 'natural monopoly' on no better evidence than the assertion of other companies ... that they are financially unable to enter the city in competition with the plaintiff."

97. Omega Satellite Products v. Indianapolis, 694 F.2d 119, 126 (7th Cir. 1982) (although court remanded for determinations of whether there was a natural monopoly in Indianapolis, it found that economic factors such as desire of cable operators to expand in order to lower costs distinguish cable as a natural monopoly); Berkshire Cablevision v. Burke, 571 F. Supp. 976, 986 (D.R.I. 1983) (court determined that cable is a natural monopoly based upon testimony of construction costs of a cable system in a particular county and the largely uncompetitive market in which cable systems operate). See also Lamb Enterprises v. Toledo Blade, 461 F.2d 506 (6th Cir.), cert. denied, 409 U.S. 1001 (1972) (court assumed, without stating why, that cable is a natural monopoly); Hopkinsville Cable T.V. v. Pennyroyal Cablevision, 562 F. Supp. 543, 547 (W.D. Ky. 1982) (no evidence cited to support court's conclusion that cable "by nature, tends to be a natural monopoly.").

Courts finding cable to be a natural monopoly have differed in their views concerning the constitutional significance of this finding. See infra notes 109-117.

98. Century Federal v. Palo Alto, 579 F. Supp. 1553, 1564 (N.D. Cal. 1984).

99. Although the defendant in Berkshire Cablevision v. Burke, 571 F. Supp. 976 (D.R.I. 1983), produced evidence of a 7 million dollar construction cost for a system in one county, reliance on a figure in the abstract is misleading, at best. While $7 million is clearly not a peppercorn, many cable systems are part of large companies that would appear to have sufficient assets for construction. See Besen and Crandall, The Deregulation of Cable Television, 4 Law and Contemp. Probs. 77, 120 (1981), for a brief list of some cable system owners. Similarly, in Berkshire Cablevision, the court determined that if certain economic factors existed, the description of cable as a natural monopoly would be accurate. It noted that evidence as to the statement's accuracy was "sketchy at best." 694 F.2d at 126.

100. In Berkshire Cablevision, 571 F. Supp. at 986, the court relied on the nature of the cable industry and its lack of competitiveness to support its decision that cable, as a natural monopoly, is subject to more stringent regulations than newspapers. However, although most communities are served by only one cable company, it proves nothing to state that cable operates without competition because of the economic features of the industry. The court further noted that "legal" scarcity, in which all but one cable operator are prohibited from operating in a particular location, might be a justifiable basis for regulation. Id. at 987 n.10. However, that is equivalent to stating that the government can regulate freely merely by predetermining that only one entity may

To be inserted as a new paragraph at the end of footnote 97.

97. On April 1, 1985, the Antitrust Division of the Justice Department terminated its investigation of a proposed merger between two competing cable operators in Phoenix and Paradise Valley, Arizona. The Justice Department press release indicated that it terminated the investigation because cable "has some natural monopoly characteristics." Thus, the Justice Department determined that the franchising city's position enables it to evaluate best whether citizens would prefer one operator or competing operators. Owen, Cable Competition at Sufferance of Cities, Wall St. J., May 9, 1985, at 28, col. 3-5. Mr. Owen, an economist active in telecommunications policy, disputes the position of the Justice Department, arguing that economic evidence of the natural monopoly status of cable is not as prevalent as that which existed in the AT&T antitrust suit that the Justice Department prosecuted vigorously, evidence exists to support the proposition that cable competition benefits consumers and that the market should decide the issue of mergers. The termination of the Justice Department examination of the proposed merger was based entirely on antitrust grounds. As the government is not cutting off desired speech or mandating other speech, no first amendment issues are implicated directly. Nevertheless, the impact of the Justice Department's decision on future lawsuits involving government interference or regulation of cable operators remains to be seen.

operate in a given locality. Such an approach places too much discretionary power in the government's hands, raising serious questions of the constitutional exercise of legislative power.

See also Community Communications v. Boulder, 660 F.2d at 1379, where the court relied on the city's assertions of cable's physical and economic scarcity. In finding that the government can regulate cable, the court stated: "[i]f when faced with a request for a license from a cable operator, government reasonably anticipates the kind of 'medium scarcity' [that results in economic scarcity], it must be permitted to deal with the effects of the scarcity that may attend the use of the license it is about to issue." Thus, the court apparently relied on nothing more than the city's own unsupported assertions that cable should be regulated as a natural monopoly. This argument is self-serving, as the district court pointed out. See supra note 96.

In HBO v. FCC, 567 F.2d at 46 n.81, the court noted that there was some evidence of economic scarcity. The evidence it referred to was an FCC report stating that "cable television's operations have developed on a non-competitive monopolistic basis in the particular areas served with no instance to our knowledge, where a member of the public subscribes to more than one cable television service." However, there is no indication of whether the areas surveyed were ones in which only exclusive franchises were offered. Moreover, technology and cable penetration have increased dramatically since 1969, when that report was prepared. See also Shapiro, Kurland and Mercurio, Cablespeech at 10-11 (1983) [hereinafter cited as Shapiro] ("[F]ranchising authorities often have overlooked or deliberately restricted opportunities for direct competition among cable systems."). The authors further suggest that by imposing financially disadvantageous requirements such as channel capacity and

access requirements upon cable operations, state and local governments have limited the number of cable systems in their jurisdiction. Id. at 11.

101. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 437 n.14 (1982). "Overbuild" is the term used to describe offers of service by more than one cable company. Multichannel News, May 3, 1982 at 49. In 1982, at least one dozen communities were overbuilt; i.e., were serviced by more than one cable operator. Id. For example, in Paramus, New Jersey, two companies provide service. See Cable TV Regulation, supra note 85 at 102. There has been some dispute, however, over whether the cable industry has shown much interest in non-exclusive franchises. See, e.g., Hopkinsville Cable Television v. Pennyroyal Cablevision, Inc., 562 F. Supp. 543 (W.D. Ky. 1982) (defendant cable company threatened to refrain from market entry if franchise was non-exclusive); Shapiro, supra note 100, at 189 ("The number of communities in which more than one cable system is operating has increased in the past few years [indicating] that cable television may not have the characteristics of a natural economic monopoly in many local markets."). Note, Access and Pay Cable Rates--Off Limits to Regulators After Midwest Video II, 16 Colum. J. Law and Soc. Probs. 591, 601 n.83 (1981) (contrary viewpoint).

While overbuild situations may not be as profitable to the cable operators as single-franchise communities, it is possible for the cable operators to earn a profit. Allentown, Pennsylvania, for example, is all-around profitable. Cablevision, April 4, 1983 at 22. In Paramus, one cable company had a sufficiently high penetration rate to enable it to earn a profit. See Cable TV Regulation, supra note 85, at 2. There,

the two companies offered substantially different types of programming. Id.

Without additional information as to the success or failure of overbuilt markets, the existence of economic scarcity is speculative at best. Indeed, even if some overbuilt communities do not offer cable operators a profitable enterprise, profitability may be affected by competition as to service tiers or types of programming available. In any event, a lack of true competition may result whenever two companies offer identical products or services.

102. New Jersey No. C-1554-83 E (Super. Ct. May 20, 1983).

103. The court stated, "I offhand, see no reason why it would not be both technically and, at least arguably, economically feasible to have a traditional cable television system ... working alongside of the kinds of systems which Earth Satellite Communications [SMATV] proposes." Id. at 6-7. Satellite Master Antenna Television System (SMATV) is defined in supra note 5.

104. Senate Report, supra note 3, at 5. The report states "advances in the delivery of video services in general have led to a more competitive environment for cable systems. With the development of multipoint distribution services, subscription television stations, videodiscs and cassettes, master antenna television and satellite master antenna television systems, low power television stations and direct satellite-to-home broadcast systems, the use of cable in our national telecommunications system has changed." During the Senate debate on S. 66, Senator Kasten stated that due to competition, cable's share of the pay television market declined from 95% in 1977 to 85% in 1982. 98th Cong., 1st Sess. 129 Cong. Rec. S8322 (daily ed. June 14, 1983). During the

Senate debates on the House-amended version of the bill, Senator Goldwater noted that over 1 million home satellite antennas have been sold since they became available. 98th Cong. 2d Sess. S.14283 (daily ed. October 11, 1984). The bill, approved by the Report, is intended to eliminate unnecessary regulation of cable television. Both the House and Senate passed regulation in order to, inter alia, "encourage fair competition." Senate Report, supra note 3, at 5. Both Congressional houses passed an amended version of the bill on October 11, 1984. The Act became effective on December 29, 1984. See supra note 8.

105. See, e.g., Goldberg, Ross and Spector, Cable Television, Government Regulation and the First Amendment, 3 Comm. Ent. L.J. 577, 590-92 (1981); Shapiro, supra note 100, 7-13, 5 n.10 and 9 n.28, for citations to analyses of the media with which cable competes and to studies of cable's market power resulting from competition with alternatives to cable. See also National Cable Television Association, Report to Senator Packwood ("Consumers have alternatives to cable that keep cable from charging a monopoly price for products.").

106. Satellite TV and Satellite Resources v. Continental Cablevision, 714 F.2d 351, 355 (4th Cir. 1983).

107. Shapiro, supra note 100, at 8 ("Alternatives are available ... for those who wish to receive the kinds of information and political discussion communicated over cable .... Each medium of public communications ... has many uses for those who wish to send communications and those who wish to receive them, and no one appears to depend solely upon cable television to fulfill his public communications needs or desires.").

108. As long as cable is not necessary, only those who are willing to accept its terms would purchase it; the government would not have any responsibility to regulate.

109. HBO v. FCC, 567 F.2d 9 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1977); Midwest Video v. FCC, 571 F.2d 1025 (1978), aff'd on other grounds, 440 U.S. 689 (1979).

110. 567 F.2d at 46. The court relied on Miami Herald Publishing v. Tornillo, 418 U.S. 241 (1974), which rejected the economic scarcity of newspapers as support for application of a right of reply statute to newspapers. See supra note 27.

111. 571 F.2d at 1055-56.

112. 395 U.S. 367 (1969). See supra note 40.

113. 660 F.2d 1370 (10th Cir. 1981).

114. According to the court, cable is distinguishable from the press because, unlike the press, cable's use of public streets ties it to the government. See infra notes 118-132 and accompanying text for discussion of this rationale. Further, cable, in contrast to the press, has traditionally been subject to regulation. Finally, cable differs from newspapers in that cable needs a license to operate. 660 F.2d at 1377-78.

See infra notes 182-218 for a discussion of the public streets rationale for cable regulation. However, the argument that cable may be regulated because it has been regulated in the past begs the question. Regulation of cable may have been justified at one time with recent technological developments rendering such regulation unnecessary. Also, perhaps cable never should have been so extensively regulated in the first place. Indeed, the Senate recognized that past regulation has hindered cable's development. Senate Report, supra note 3.

115. 571 F.2d at 1379.

116. 694 F.2d 119 (7th Cir. 1982).

117. See supra note 97 for the basis of the court's determination that cable's economic scarcity renders it a natural monopoly.

118. See FCC v. League of Women Voters, 104 S. Ct. 3106 (1984).

119. However, just as the government cannot pervasively regulate monopoly industries that are not utilities, it arguably cannot regulate cable simply because it might be a natural monopoly. If cable were viewed as an essential service, the government would be able to impose more stringent regulations. Since cable is not essential, the government's right to regulate it should be narrower. Note, however, that changing technology may one day render cable an essential service because of its potential for two-way interactive services and therefore subject to greater regulation.

120. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 248-50 (1974).

121. Omega Satellite Products v. Indianapolis, 694 F.2d 119 (7th Cir. 1982); Community Communications v. Boulder, 660 F.2d 1370 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982); Berkshire Cablevision v. Burke, 571 F. Supp. 976 (D.R.I. 1983); Hopkinsville Cable v. Pennyroyal Cablevision, 562 F. Supp. 543 (W.D. Ky. 1982); Century Federal v. Palo Alto, 579 F. Supp. 1553 (N.D. Cal. 1984); Illinois Broadcasting v. Decatur, 96 Ill. App. 2d 454, 238 N.E.2d 261 (1968).

122. Omega Satellite Products v. Indianapolis, 694 F.2d at 127; Community Communications v. Boulder, 660 F.2d at 985; Hopkinsville Cable v. Pennyroyal Cablevision, 562 F. Supp. at 547. But see Century Federal v. Palo Alto, 579 F. Supp. at 1564-65 (California legislature dedicated surplus space and excess capacity on public utility poles, manholes and other support structures for use by cable operators in Public Utility Code §767.5(b); court remanded for determination of constitutional significance of the dedication).

123. Community Communications v. Boulder, 660 F.2d at 1379. Cf. Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969) (broadcasting license may be granted if in "public interest, convenience or necessity.").

124. Cf. Satellite Television of New York Associates v. Finneran, 579 F. Supp. 1546 (S.D.N.Y. 1984) (local government has no regulatory jurisdiction over operator who does not use public streets).

125. Cox v. New Hampshire, 312 U.S. 569 (1941) (city may regulate use of streets).

126. See Preferred Communications, Inc. v. City of Los Angeles, No. 84-5541, slip op at 14-17 (9th Cir. March 1, 1985). As the author of Note, supra note 80, at 1019, points out, use of public streets brings one's first amendment rights into play. It would be absurd to suggest that use of public facilities precisely because they are public, would allow more regulations than use of non-public areas.

Cf. H.R. 4103, 98th Cong. 2d Sess., §602(6)(B) (1984), provides that the Act which not apply to facilities that serve subscribers in multiple dwelling units unless the facility or facilities use any public right-of-way. ; Satellite Television of New York Associates v. Finneran, 579 F. Supp. 1546 (S.D.N.Y. 1984) (New York State Commission on Cable Television has no jurisdiction over system that does not use public right-of-way). Cf. H.R. 4103, supra, §621(3)(C), which states that the Act does not affect the authority of any State to license or otherwise regulate any facility which serves subscribers in multiple-dwelling units and which does not use any public right-of-way.

127. See, e.g., Schad v. Mount Ephraim, 452 U.S. 61 (1981) (reasonable time, place and manner restrictions are valid, but cannot bar certain types of speech); Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) (legitimate interest in protecting public order does not justify

selective exclusion of speakers); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) (government can prevent serious disruption of normal street usage, but cannot improperly interfere with first amendment rights by requiring license to march in streets); Martin v. Struthers, 319 U.S. 141 (1943) (government can regulate time, place and manner of information distribution but must preserve freedom to distribute).

128. See supra note 63.

129. See supra note 65.

130. See supra note 45.

However, even broadcast regulation cannot be broader than necessary to promote broadcast diversity and to alleviate monopoly effects. The government cannot control content beyond imposing the reply and fairness doctrines. See infra notes 158-59. Broadcasters are otherwise free to include whatever programming content they desire. Government restriction can only require presentation of opposing views to achieve the first amendment goal of an informed public through balanced programming. Broadcast programs have also been indirectly subject to regulation in that licenses are only renewed if in the "public interest, convenience and necessity." FCC v Pacifica Foundation, 438 U.S. 726 (1979). However, the FCC recently decided to allow market forces rather than its own notions of "public interest, convenience or necessity" to govern programming. This power was upheld in FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981).

131. See supra note 39.

In HBO v. FCC, 567 F.2d at 45 n.80, the court rejected the government's argument that since cable uses retransmitted broadcast signals, government control over broadcast justifies similar control over cable.

The court in Midwest Video v. FCC, 571 F.2d at 1054, also rejected this argument, stating that "[i]f there be any arguable relationship between cablecasting and retransmission, it would appear far too tenuous and uncertain to warrant a cavalier overriding of First Amendment rights present in cablecasting."

132. See Preferred Communications, Inc. v. City of Los Angeles, No. 84-5541, slip op. at 22 (9th Cir. March 1, 1985) (although the City may promulgate reasonable time, place and manner restrictions, it may not with unfettered discretion limit access by more than one cable operator without the highest "bidder"). See also supra note 63.

133. The interplay between allowable time, place and manner restrictions based upon cable's use of public streets and invalid regulations that impinge upon cable's first amendment rights may be compared to zoning regulations. While zoning serves important government interests, strict scrutiny of zoning regulation is required where first amendment rights are involved. In Schad v. Mount Ephraim, 452 U.S. 61, 75-76 (1981), the Supreme Court recognized that zoning ordinances are valid if they both serve significant government interests and leave open "ample alternative channels of communication." However, the Court invalidated an ordinance banning all live entertainment because it interfered with first amendment values as it failed to provide alternative avenues of communication. See also Bayside Enterprises v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978), in which the court found a zoning ordinance restricting the location of adult entertainment unconstitutional because even though the legislature's intent was not to affect free expression, but to benefit public health and safety, the regulations did negatively affect free speech. Accordingly, regulations that, on their face, are

no more than time, place or manner restrictions must nevertheless be examined closely by use of the appropriate test if they affect first amendment liberties.

Indeed, the Senate has recognized that the use-of-streets rationale is insufficient to support the extensive local regulation of cable that currently exists. The Senate committee on Commerce, Science and Transportation, in its report to S. 66, stated that:

> "The premise for the exercise of this expanded local jurisdiction over cable systems continues to be use of local streets and rights of way. In the past, local regulation bore a reasonable relationship to that use. With the introduction of cable into larger markets and the expansion of services provided over cable, the degree and detail of local regulation has increased and there is no longer a reasonable relationship between local regulation and cable systems' use of streets and rights of way."

Senate Report, supra note 3, at 6.

134. See, e.g., Perry v. Sindermann, 408 U.S. 593, 597 (1972) (the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interest--especially his interest in freedom of speech [because] if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited"); Frost and Frost Trucking v. Railroad Commission, 271 U.S. 583 (1926).

135. Perry, 408 U.S. at 597.

136. Cable TV Report and Order, 36 FCC 2d 143 (1972).

137. The FCC stated: "Another matter uniquely within the competence of local authority is the delineation of franchise areas. We emphasize that provision must be made for cable service to develop equitably and

reasonably in all parts of the community. A plan that would bring cable only to the more affluent parts of a city, ignoring the poorer areas, simply could not stand. No broadcast signals would be authorized under such circumstances.... There are a variety of ways to divide up communities; the matter is one for local judgment." 36 FCC 2d at 208. See also id. at 276.

138. Defendants' Memorandum of Law in Support of their Motion to Dismiss and in opposition to Plaintiffs' Motion for a Preliminary Injunction [hereinafter cited as Defendants' Memorandum] and Memorandum of Law of the City of the New York in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Motion for a Preliminary Injunction [hereinafter cited as Memorandum of the City of New York], Satellite Television of New York Associates v. Finneran, 579 F. Supp. 1546 (S.D.N.Y. 1984). The tendency of cable operators to favor certain areas also occurs where the area in dispute is less densely populated. There, houses tend to be too far apart to justify the costs of wiring the area. In densely populated regions, although the construction costs may be high, the operator will service many more homes, standing to recover initial costs sooner and eventually to earn higher profits. See also Board of Public Utilities, Memorandum from John Cleary, Director, Office of Cable Television, to the Board, August 22, 1980, at 16 ("[I]nherent in any discussion of underground construction...is the issue of cream-skimming [because] [n]o one wants to build an expensive less profitable underground area, while everyone wants to serve high density aerial areas.").

139. In its report to S.66, the Senate Committee on Commerce, Science and Transportation stated that cable "has a special obligation to provide the capability for...diverse sources [of programming] to reach the

public." Senate Report, supra note 3, at 22. However, later in the report, the Committee recognized that cable is neither a monopoly nor an essential service. Id. at 29.

In Preferred Communications, Inc. v. City of Los Angeles, No. 94-5541 (9th Cir. March 1, 1985), the cities of Palo Alto, Menlo Park and Atherton filed an amicus brief, asserting inter alia that the City's interests in preventing cream-skimming justified its franchise procedure. However, the Court declined the invitation to uphold the procedure on anti-cream-skimming grounds. Slip op. at 39-40 n.9.

140. New York Executive Law, §824 (McKinney 1982), provides:

> Whenever...the commission [on cable television] finds that, despite its economic feasibility,...the extension of service to any persons or area within a cable television company's territory has been unreasonably withheld, it may order such construction, operation or extension on such terms and conditions as it deems reasonable and in the public interest.

141. For example, Manhattan, one of New York's five boroughs, has three different cable operators. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

142. Defendants' Memorandum, supra note 135, at 21.

143. The section states:

> "In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides."

In reference to this section, Congressman Wirth stated during the House debate on the bill, "[t]his provision is intended to assure that

franchising authorities meet the responsibility they already have to prevent economic redlining in granting cable franchises." 98th Cong., 2d Sess., 130 Cong. Rec. H 10442 (daily ed. October 1, 1984) [hereinafter cited as House debate]. He went on to note, however, that the provision "is not designed to require a cable operator to...build a line extension which may be too remote to wire economically." Id.

Congressman Tauke similarly noted during the House debate that the provision is intended to remedy the lack of access that many urban residents have to cable. "Our first amendment responsibility is to try to ensure that as many people have access to as broad and as diverse a choice of viewing possibilities on their television sets as we can reasonably give to them" Id. at H10445.

144. The legislation may also infringe the due process rights of cable. By requiring cable to expend large sums that it might otherwise use in a different manner, the legislation arguably constitutes a compensable taking. Furthermore, the entire franchise process, including anti-cream-skimming provisions arguably treats cable as a public utility. Both of these areas are beyond the scope of this Article.

145. See Tribe, supra note 80, §12-2, at 580.

146. Although four such categories have traditionally been recognized, with a fifth recently added, the Supreme Court may be inclined toward eliminating the concept that certain types of speech are wholly without first amendment protection. The four categories traditionally considered unprotected are fighting words, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); words constituting a clear and present danger, Schenck v. United States, 249 U.S. 47 (1919); defamatory speech, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (this view, however, was rejected in New York Times v. Sullivan, 376 U.S. 254 (1964), see Tribe, supra note 80,

§12-13, at 683); and obscenity, Roth v. United States, 354 U.S. 466 (1957). Recently the Supreme Court determined that non-obscene pornographic portrayals of children is unprotected speech, New York v. Ferber, 458 U.S. 747 (1982). Although at one time the Supreme Court considered commercial speech to be constitutionally unprotected, in Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), it rejected that approach, recognizing that commercial speech is entitled to some first amendment rights, though not the full spectrum which non-commercial speech receives. Generally, the Supreme Court has evidenced an inclination to abolish an approach to the first amendment that considers certain categories of speech to be unprotected. See Tribe, supra note 80, §12-17, at 670-72, for a thorough discussion of the Court's erosion of this concept.

147. United States v. O'Brien, 391 U.S. 367, 376-77 (1963). O'Brien is the seminal case involving a balancing between the government's regulation of the non-communicative aspects of an expression and the speaker's interest in the communicative impact. See Consolidated Edison v. PSC, 447 U.S. 530, 540 n.9 (1980) ("The O'Brien test applies to regulations that incidentally limit speech where 'the governmental interest is unrelated to the suppression of free expression....'"). See also Schad v. Mount Ephraim, 452 U.S. 61 (1981).

In contrast to challenges to legislation that does not affect constitutional interests, the burden of proof in cases of first amendment impingement falls upon the government to sustain the regulation. Bayou Landing v. Watts, 563 F.2d 1172 (5th Cir. 1977), cert. denied, 439 U.S. 818 (1978); Bayside Enterprises v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978).

148. Tribe, supra note 80, §12-2, at 582. See also Saia v. New York, 334 U.S. 558, 562 (1934) ("Courts must balance the community interests in passing on the constitutionality of local regulations of the character involved here. But in that process, they should be mindful to keep the freedoms of the first amendment in a preferred position.").

149. Schad v. Mount Ephraim, 452 U.S. 61, 68 (1981) ("[T]he standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed.").

150. Consolidated Edison v. PSC, 447 U.S. 530 (1980).

151. The Supreme Court has consistently rejected legislative and judicial attempts to cut off protected speech. See, e.g., Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (gag order on press was unconstitutional despite defendant's asserted sixth amendment rights to a fair trial); New York Times v. Sullivan, 376 U.S. 254 (1964) (Court set forth malice standard applied against public figures as well as public officials to avoid chilling effects on speech of sanctions for defamation).

152. See, e.g., Bayside Enterprises v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978) (ordinance generally regulating and specifically prohibiting adult movies and stores within 2,500 feet of churches and schools unconstitutional because it effectively barred future access of adult entertainment businesses to the community as there were no remaining prescribed areas in which such businesses could locate).

153. Buckley v. Valeo, 424 U.S. 1, 49 (1975). The Court explained this principle:

> "The concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is foreign to the First Amendment, which was designed `to secure 'the widest possible dissemination of information from

diverse and antagonistic sources,"' and 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'

New York Times Co. v. Sullivan [376 U.S.] at 266, 269 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945) and Roth v. United States, 354 U.S. at 484). The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion."

154. See supra notes 10-20.

155. 424 U.S. 1 (1975).

156. As the Court stated, "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience.... This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money." 424 U.S. at 19 (footnote omitted).

157. Id. at 65 n.76.

158. Miami Herald v. Tornillo, 418 U.S. 241 (1974); FCC v. League of Women Voters, 104 S. Ct. 3106 (1984); Midwest Video v. FCC, 571 F.2d 1025 (D.C. Cir. 1978), aff'd, 440 U.S. 689 (1979). See Associated Press v. United States, 326 U.S. 1, 14-15 (1945) (Court recognized that Associated Press, a provider of a news service, as a property owner can choose its own associates and decide whether and to whom it will sell

the news; however, it cannot use this right to obstruct the free flow of commerce by violating antitrust laws).

159. 418 U.S. 241 (1974).

160. 418 U.S. at 256.

161. 104 S. Ct. 3106 (1984).

162. Id. at 3129.

163. Id. at 3118-19.

164. 571 F.2d 1025 (D.C. Cir. 1978).

165. Id. at 1056.

166. See, e.g., Collin v. Chicago Park District, 460 F.2d 746 (7th Cir. 1972) (denial of park permit); Dr. Martin Luther King, Jr., Movement v. Chicago, 419 F. Supp. 667 (N.D. Ill. 1976) (denial of parade permit for selected streets; instead permit given for government-mandated route). See also Shapiro, supra note 100, at 207-08.

167. In their terms, anti-cream-skimming policies do not attempt to control programming content. However, choice of audience has a direct effect on programming. For example, most broadcast programming is strikingly similar because it appeals to the lowest common denominator in order to appeal to the widest possible audience. See Note, supra note 80, at 1024, and material cited therein. Moreover, as operators select audiences so as to maximize profitability, and change of audience scope may well necessitate changes in programming to neutralize negative effects on profits, anti-cream-skimming provisions will indirectly affect editorial control. The fact of effect, rather than the extent or type of effect, should be the relevant factor in assessing first amendment implications.

168. The consensus seems to be that although cable may be unique in its ability to bring diverse programming into the home, it is not an essential service. See, e.g., Senate Report, supra note 3, at 29. The non-essential nature of cable distinguishes it from industries such as telephone and electric that are commonly regulated as public utilities. See id. at 4, 29 (no government can regulate cable as public utility). Moreover, cable has significant first amendment interests not possessed by public utility industries. And in any event, public utilities are entitled to some first amendment protection. See, e.g., Consolidated Edison v. PSC, 447 U.S. 530 (1980) (even though a public utility, Con Edison has first amendment rights which may not be infringed without sufficient government interest and no available alternative); Jones, Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920, 79 Colum. L. Rev. 426 (1979) [hereinafter cited as Jones, Origins of the Certificate].

However, some states have elected to treat cable as a public utility. See, e.g., NRS §704.020(1)(g) (Nevada); Cal. Pub. Utilities §§215.5, 768.5 (California) (regulated for public health and safety); 54 Opinions of California Attorney General 135, 8-5-71; Hopkinsville Cable v. Pennyroyal Cablevision, 562 F. Supp. 543 (W.D. Ky. 1982) (Kentucky) (cable bound by section 163 of the state constitution that requires utilities to be franchised); Jones, Origins of the Certificate, supra.

It is doubtful whether regulation of cable as a public utility would be upheld by the Supreme Court. See Associated Press v. United States, 326 U.S. 1, 48 (1945) (Roberts, J., dissenting), in which Justice Roberts argues that the majority's finding that Associated Press violated the Sherman Act effectively caused Associated Press to become a public utility:

"It is not protecting a freedom, but confining it, to prescribe where and how and under what conditions one must impart the literary product of his thought and research."

In addition, cable does not fit neatly within the standard definition of a utility, "a monopoly over the supply of a product," Central Hudson Gas and Electric v. PSC, 447 U.S. 557, 567 (1980), as cable competes with other media to supply information and entertainment. A utility has also been defined as a "government regulated monopoly." Consolidated Edison v. PSC, 447 U.S. 530, 534 (1980). There are significant first amendment problems with government classification and regulation of cable as a monopoly. For instance, government cannot regulate the only newspaper in an area as a public utility. Moreover, the government cannot unilaterally declare that cable is a monopoly, classify it as such, and then use the classification as justification for additional regulation. Finally, even entities that are clearly public utilities still possess first amendment freedoms which may not be infringed unless the regulation passes muster under the level of scrutiny required when first amendment interests are at stake. Id. Accordingly, classification of cable as a public utility would still not foreclose an examination into the impact of government regulation upon first amendment rights.

169. Minneapolis Star and Tribune v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976), cert. denied, Leipzig v. Baldwin, 431 U.S. 913 (1977) (fee for inspection of political posters); Moffett v. Killian, 360 F. Supp. 228 (D. Conn. 1973) (filing fee for lobbyists).

170 460 U.S. 575 (1983).

171. Id. at 581.

172. Id. at 582.

173. Murdock v. Pennsylvania, 319 U.S. 105 (1943); United States Labor Party v. Codd, 527 F.2d 118 (2d Cir. 1975); Milwaukee Mobilization for Survival v. Milwaukee County Park Comm'n, 477 F. Supp. 1210 (E.D. Wis. 1979); Bayside Enterprises v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978); Universal Film Exchanges v. Chicago, 288 F. Supp. 286 (N.D. Ill. 1968). The level of scrutiny is higher where constitutional rights are implicated than where mere economic interests are at stake. Bayside Enterprises v. Carson, 450 F. Supp. at 696.

Where the taxed activity is not a fundamental right, that tax may be invalidated only under the due process clause. See, e.g., Pittsburgh v. Alco Parking Lot, 417 U.S. 369 (1974) (tax on parking); Magnano v. Hamilton, 292 U.S. 40 (1934) (tax on butter substitute).

174. Murdock v. Pennsylvania, 319 U.S. 105, 113-14 (1943).

175. Murdock v. Pennsylvania, 319 U.S. at 110-11 (alleged justification was city's right to charge reasonable fees for canvassing where the canvassing involves a solicitation of funds); Baldwin v. Redwood City, 540 F.2d 1360, 1371 (9th Cir. 1976) (city claimed fee per political poster was necessary for inspection; court rejected argument, finding fee arbitrary); Bayside Enterprises v. Carson, 450 F. Supp. 696, 705 n.11 (M.D. Fla. 1978) (city's argument that high licensing fee was necessitated by projected expenses of regulatory enforcement was purely speculative and "def[ied] common sense").

176. See Shapiro, supra note 100, at 205-06 ("The fees charged for...use [of public ways by cable operators] are constitutionally limited to an amount that the government can demonstrate is necessary to cover the reasonable costs it bears as a result of the use. This principle applies not only to monetary payments demanded by the government for the use of public property, but also to other burdensome conditions imposed

upon cable operators."). See also Gannett Satellite Information Network v. MTA, 579 F. Supp. at 99 (court held license fee for distribution of newspapers unconstitutional as repugnant to the traditional concept of First Amendment values where the government justified the fee as a revenue-raising measure for partial subsidization of commuter transportation).

177. See supra notes 10-20 and accompanying text.

178. There is no evidence to suggest the contrary. The government has not indicated any interest to interfere with expression. Rather, the alleged purpose behind such regulations is to enhance the diversity of material presented to all residents in a given area. See Cable TV Report and Order, 36 FCC 2d 143 (1972); Memorandum of the City of New York, supra note 138; House debate, supra note 143. In HBO v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977), the court struck down FCC rules which prevented carriage of certain movies by cable, stating:

> "Applying O'Brien here, we cannot say that the pay cable rules were intended to suppress free expression. The narrow purpose espoused by the commission--protecting the viewing rights of those not served by cable or too poor to pay for cable--is neutral."

The entire franchise procedure raises another first amendment issue relating to the criteria upon which franchises are awarded. If franchise grants were based upon selection of channels or programming, the procedure would not be content-neutral. As a content-based regulation, it could then be sustained only if cable programming fit into a category of unprotected speech, see supra note 146, or if cable merited treatment as broadcasting, which because it does not possess as many first amendment rights as other media, may be licensed based on content. However,

since cable overall is not obscene, defamatory, a clear and present danger, incendiary or child-pornographic, only if equivalent to broadcasting in first amendment terms could it be regulated as broadcasting. As discussed in supra section IC, cable and broadcasting should not be considered identical for first amendment purposes. Accordingly, cable franchise decisions should not be subject even to the limited content-based interference present in the broadcast industry.

179. See supra Section IC(1)-(3).

180. See, e.g., Consolidated Edison v. PSC, 447 U.S. 530, 549-50 (1980) (Blackman, J., dissenting) (monopoly status of utilities allows states to regulate rates to prevent overreaching).

181. See supra notes 121-22.

182. Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 650-51 (1981) ("[A] state's interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective."). See Hague v. CIO, 307 U.S. 496 (1939) (government can maintain order); Jamison v. Texas, 318 U.S. 413, 416 (1943) (government may control traffic to insure health and safety of traveling public); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Schneider v. State, 308 U.S. 141, 160 (1939); Wright v. Chief of Transit Police, 558 F.2d 67 (2d Cir. 1977) (may protect public safety); Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976); Southern New Jersey Newspapers v. New Jersey, 542 F. Supp. 173 (D.N.J. 1982); Bayside Enterprises v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978).

183. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S.37 (1983) (Court found no public forum). Although the state's right to limit access to a public forum is very narrow, it possesses the power to

regulate for "the general comfort and convenience." Hague v. CIO, 307 U.S. 496, 516 (1939); Greer v. Spock, 424 U.S. 828 (1976) (military base is not a public forum; government does not need substantial interest to sustain regulatory activity); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (government-operated transit car is not a public forum).

184. See United States Postal Service v. Greenburgh Civic Ass'n, 453 U.S. 114, 131 n.7 (1981) ("[P]roperty owned or controlled by the government which is not a public forum may be subject to a prohibition of speech, leafletting, picketing or other forms of communication without running afoul of the First Amendment.") (emphasis in original).

If the government-owned property is not a public forum, the government may exclude speakers who possess a first amendment right to speak elsewhere. In Greer v. Spock, 424 U.S. 828 (1976), the government validly excluded political speakers from a military base though they would clearly have had the right to speak in a public park. See also Wright v. Chief of Transit Police, 558 F.2d 67, 68 n.1 (2d Cir. 1977) ("[W]hether or not a particular forum is a 'public forum' akin to a public street is merely a variant of the 'compelling interest' test.") (citations omitted).

185. 307 U.S. 496 (1939).

186. Id. at 516. The Court found unconstitutional ordinances prohibiting distribution of printed matter because such distribution is a form of public expression of labor speakers.

187. Hague v. CIO, 307 U.S. 496, 516 (1939).

188. Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) ("Jesse Cantwell [arrested for breach of peace and failure to obtain a license]...was upon a public street, where he had a right to be, and where he had a

right peacefully to impart his views to others."); Schaumburg v. Citizens for Better Environment, 444 U.S. 620 (1980) (charitable solicitations); Reilly v. Noel, 384 F. Supp. 741 (D.R.I. 1974) (prayer meetings in state capital); Jeanette Rankin Brigade v. Chief of Capital Police, 342 F. Supp. 575 (D.D.C. 1972), aff'd, 409 U.S. 972 (1972); Collin v. Chicago Park District, 460 F.2d 746 (7th Cir. 1972). See also Widmar v. Vincent, 454 U.S. 263 (1981) (university regulation prohibiting meetings of students' religious groups violated the first amendment).

189. Carey v. Brown, 447 U.S. 455 (1980); Grayned v. City of Rockford, 408 U.S. 104 (1972); Jamison v. Texas, 318 U.S. 413 (1943) (distribution of handbills and literature); Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir.), cert. denied, 393 U.S. 940 (1968) (speech and distribution of literature in bus terminal).

190. Philadelphia News v. Borough of Swarthmore, 381 F. Supp. 228 (E.D. Pa. 1974); Southern N.J. Newspapers v. New Jersey, 542 F. Supp. 173 (D.N.J. 1982); Kash Enterprises v. Los Angeles, 19 Cal. 3d 294, 562 P.2d 1302, 138 Cal. Rptr. 53 (Sup. Ct. 1977); Miller Newspapers v. Keene, 546 F. Supp. 831 (D.N.H. 1982); Saia v. New York, 334 U.S. 558, 561 (1948) (loudspeakers are an integral part of public speech); Rubin v. City of Berwyn, 553 F. Supp. 476 (N.D. Ill.), aff'd, 698 F.2d 1227 (7th Cir. 1982).

191. Hague v. CIO, 307 U.S. 496, 515 (1939).

192. Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. at 45; Widmar v. Vincent, 454 U.S. 263, 267 (1981) ("Through its policy of accommodating their meetings, the university has created a forum generally open for use by student groups.").

193. Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 650-51 (1981) ("[T]he significance of the governmental interest

must be assessed in light of the characteristic nature and function of the particular forum involved.").

194. Hague v. CIO, 307 U.S. 496, 515 (1939).

195. Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981).

196. Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

197. Greer v. Spock, 424 U.S. 828 (1976).

198. United States Postal Service v. Greenburgh Civic Ass'n, 453 U.S. 114 (1981).

199. Southern New Jersey Newsboxes v. New Jersey, 542 F. Supp. 173 (D.N.J. 1982); Philadelphia News v. Borough of Swarthmore, 381 F. Supp. 228 (E.D. Pa. 1974); Kash Enterprises v. Los Angeles, 10 Cal. 3d 294, 562 P.2d 1302, 138 Cal. Rptr. 53 (Sup. Ct. 1977).

200. Wolin v. Port of New York Authority, 394 F.2d 83 (2d. Cir.), cert. denied, 393 U.S. 940 (1968).

201. Reilly v. Noel, 384 F. Supp. 741 (D.R.I. 1974).

202. Saia v. New York, 334 U.S. 558 (1948) (loudspeaker); Southern New Jersey Newsboxes v. New Jersey, 542 F. Supp. 173 (D.N.J. 1982) (newsboxes).

203. Grayned v. City of Rockford, 408 U.S. 104 (1972) (statute prohibiting picketing in front of school held unconstitutional, though anti-noise statute upheld because of incompatibility of expression with the location and government's compelling interest in undisrupted school sessions). The factors considered in this determination are whether "the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance." Wolin v. Port of

New York Authority, 392 F.2d 83 (2d Cir.), cert. denied, 393 U.S. 940 (1968). See also Gannett Satellite Information Network v. MTA, 579 F. Supp. at 94-95.

204. However, government-owned property is not necessarily a public forum merely because it is used for the communication of ideas or information. United States Postal Service v. Greenburgh Civic Ass'n, 435 U.S. 114, 129, 130 n.6 (1981) (mailboxes not a public forum because unauthorized use of mails for speech is incompatible with maintenance of national system for efficient mail service).

205. In fact, future technological advances may allow cable channel capacity to be increased by means of existing cable--i.e., without requiring the laying of additional cable. Commentators have raised the possibility that these advances may lead to leasing of cable space by one operator to another. See, e.g., Jones, Origin of the Certificate, supra note 168, at 512 (an alternative to the certification process involves the compulsion "of interconnection among separate telecommunications entities, thereby providing access to all subscribers notwithstanding a multiplicity of operating entities") (footnote omitted). Indeed, H.R. 4103, supra note 8, provides for mandatory commercial leasing of cable channels by cable operators. The amount of space that must be made available for lease varies with the total channel capacity of the particular cable operator. Id. §612. This would eliminate multiple construction by more than one cable operator.

206. See supra note 184.

207. In Preferred Communications, Inc. v. City of Los Angeles, No. 84-5541, slip op. at 21-22 (9th Cir. March 1, 1985), the court found that California's dedication of "surplus space" on public utility structures for use by cable operators would constitute some type of public forum,

either by tradition or designation. Furthermore, the actual franchise process, as an indication of the City's attempt to grant access to its facilities, reaffirmed the categorization of utility poles and underground conduits as a public forum. Cf. Perry, 460 U.S. at 46 n.7 ("A public forum may be created for a limited purpose...such as use by certain groups...or for the discussion of certain subjects....").

208. These undertakings frequently related to cable facilities, access channels and equipment. See supra note 123. See also New York Executive Law §800 et seq (McKinney's 1982).

209. See Preferred Communications, Inc. v. City of Los angeles, No. 84-5541, slip op. at 22 (9th Cir. March 1, 1985). Part of the government's justification for cable regulation is cable's use of public streets to carry signals. See supra notes 118-20. Thus, the government apparently recognizes that cable uses a public forum. It seems ironic that use of public streets entitling cable to first amendment protection because of the public forum doctrine would also enable government to regulate it more intrusively on the theory that cable needs a license to use that forum. See Note, supra note 80, at 1019. There is no real contradiction, however, since cable is entitled to benefit from the public forum doctrine, subject only to the government's right to impose narrowly-drawn time, place and manner restrictions on use of the under-street space.

210. See supra notes 125, 127.

211. See supra note 127.

212. See, e.g., Preferred Communications, Inc. v. City of Los Angeles, No. 84-5541, slip op. at 23 (9th Cir. March 1, 1985) (the government's right to impose reasonable time, place, and manner restrictions on the laying of cable does not allow it to restrict access to all but one speaker);

Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) (government may not use permit procedure as means of regulating time, place and manner of peaceable processions where such procedure constitutes prior restraint); Saia v. New York, 334 U.S. 558 (1948) (permit system for use of sound amplification equipment held unconstitutional because too broad to be a valid time, place and manner regulation); Police Department v. Mosley, 408 U.S. 92, 101 n.8 (1972) ("In a variety of contexts we have said that 'even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle personal liberties when the end can be more narrowly achieved.'... This standard, of course, has been carefully applied when First Amendment interests are involved.") (citations omitted); Consolidated Edison v. PSC, 447 U.S. 530, 540 (1980) ("[T]he Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property.").

213. Even where time, place and manner restrictions are reasonable, to be valid they must be "narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication." Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37 (1983). See also Community Communications v. Boulder, 496 F. Supp. at 829 ("A generalized judicial approval of regulatory authority over cable television creates the danger that municipal governments may use the leverage of their ownership of the rights-of-way, provide access to the public, for the exercise of pervasive control over content in an important part of the communications industry."). See infra Section IIIC for a discussion of whether anti-cream-skimming legislation meets these criteria.

214. Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. at 46 ("The state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.") (quoting United States Postal Service v. Greenburgh Civic Association, 453 U.S. at 129).

215. Id. Where a non-public forum is involved, the government may indeed exclude on the "basis of subject matter and speaker identity." Id. at 49. The government is thus permitted to regulate more intrusively than with a public forum. See also United States Postal Service v. Greenburgh Civic Ass'n, 453 U.S. 114 (1981) (since public mails are a non-public forum, speakers who wished to deposit unstamped mail in residential mailboxes could be denied access to the boxes); Grayned v. Rockford, 408 U.S. 104 (1972) (public schools not a public forum, therefore allowing exclusion of activities, such as noisy picketing, that were disruptive and therefore incompatible with school activities); Greer v. Spock, 424 U.S. 828, 840 (1976) (military can exclude political speakers from base because speakers considered a "clear danger to the loyalty, discipline or morale of troops" and therefore were incompatible with purpose of forum); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (city permitted to ban political ads from city-owned rapid transit vehicles because of city's interest in presenting transportation for the public convenience as a non-political forum).

Justice Powell, concurring in Greer, stressed that in an inquiry as to "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time," it would not be

> "sufficient that the area in which the right of expression is sought to be exercised be dedicated to some purpose other than

> use as a 'public forum,' or even that the primary business to be carried on in the area may be disturbed by the unpopular viewpoint expressed.... Our inquiry must be more carefully addressed to the intrusion on the specific activity involved and to the degree of infringement on the first amendment rights of the private parties. Some basic incompatibility must be discerned between the communication and the primary activity of an area."

424 U.S. at 843. In sum, the government's interest in maintaining the forum for its intended purpose is sufficiently substantial to override the impact on first amendment rights of an excluded incompatible speaker.

216. Cable conduits are distinguishable from the interschool mail system in Perry. In Perry, a local board of education allowed the union representing the teachers in the board's district to use the interschool mail system, but denied access to a rival union. It contended that the interschool mail system was not a public forum and hence the rival union could be excluded. The Supreme Court agreed, finding that exclusion was reasonable because it was "wholly consistent with the district's legitimate interest in 'preserv[ing] the property...for the use to which it is lawfully dedicated,'" 460 U.S. at 50-51 (quoting United States Postal Service v. Greenburgh Civic Ass'n, 453 U.S. at 129-30). Restricting access to the representative union ensured that it could adequately represent all teachers while preserving labor peace. Id. at 952. The Court further stated that where a non-public forum is at issue, the government may, without justification, restrict access to those "who participate in the forum's official business." Id. at 53. However, it

also based affirmance of the Board's access policy on the existence of alternative communication channels available to the excluded union. Underground and overhead conduits, by contrast, are not dedicated to serve specific governmental interests or "official business," nor are there alternative means available for delivering cable signals.

217. See Grayned v. City of Rockford, 408 U.S. 104 (1972), in which the Supreme Court upheld the city's antinoise ordinance because it prevents interference with school activities, but struck down an antipicketing ordinance because silent picketing would not be incompatible with a school session. In determining whether the area around the school could be restricted to certain activities, the Court stated that "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Id. at 116. Because the antinoise ordinance was in fact applied to prohibit noisy activities during school hours, the Court considered it a valid time, place or manner restriction. In upholding the antinoise ordinance, it stated: "Rockford's modest restriction on some peaceful picketing represents a considered and specific legislative judgment that some kinds of expressive activity should be restricted at a particular time and place, here in order to protect the schools." Id. at 121.

218. Of course, if the underground areas became overcrowded, leaving no space for other cables, the issue might require a different result. However, no evidence of such crowding has been offered or suggested in the cases. In any event, development of new technologies may lead to expanded channel capacities in a more spatially limited area.

219. Defendants' Memorandum Law, supra note 138, at 19. The state expressed fear that if a SMATV system were allowed to operate in an area

franchised to a cable operator, the entire cable system would be open to complete deregulation: "If that occurred, the first amendment rights of subscribers to private cable systems (as well as the general public) would be left unprotected." Id. at 9.

See also Memorandum of the City of New York, supra note 138, at 23 ("In any event, the governmental interest in the cable franchising process can be easily stated [as an interest in assuring that all citizens have broad and equal access to cable television].... The City has sought to assure that all of its citizens will receive cable services by requiring this in its cable franchise agreements.").

220. Stanley v. Georgia, 394 U.S. 564 (1969) (statute forbidding possession of obscene materials in one's own home is unconstitutional); Lamont v. Postmaster General, 381 U.S. 301 (1965) (requirement that persons desiring to receive "communist political propaganda" send card to post office stating such desire held unconstitutional); Griswold v. Connecticut, 381 U.S. 479 (1965) (state may not prohibit use of contraceptives); Southern New Jersey Newspapers v. New Jersey, 542 F. Supp. 173 (D.N.J. 1982) (public has right to uninhibited distribution of newspapers); Community Communications v. Boulder, 660 F.2d 1370, 1376 (10th Cir. 1981) ("The Citizens of Boulder also have significant first amendment interests at stake in the franchise system."), cert. dismissed, 456 U.S. 1001 (1982); Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969) ("[T]he right of the listeners is paramount.").

221. In Miami Herald Publishing v. Tornillo, 418 U.S. 241 (1974), the Supreme Court struck down a statute requiring newspapers to publish certain editorial material. In Pell v. Procunier, 417 U.S. 817 (1974), the Supreme Court upheld a state regulation permitting only limited press

interviews of prisoners, even though the Court recognized that "the first and fourteenth amendments also protect the right of the public to receive such information and ideas as are published." 417 U.S. at 832. Thus, although the public has a right to receive published or disseminated information, that interest does not mandate such publication. See also Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California, 719 F.2d 1017 (9th Cir. 1983) (the first amendment does not impose "a duty of affirmative action to make television accessible to the hearing impaired"; thus, television stations and the federal government are not required to caption programs with subtitles for the benefit of the hearing impaired).

Significantly, cases recognizing a public right-to-know have typically struck down legislation because of the public first amendment right. A different situation arguably occurs when government seeks to uphold legislation by reference to such a right.

222. Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969).

223. See supra Section IC.

224. In Miami Herald Publishing v. Tornillo, 418 U.S. 241 (1974), reacting to the Florida Supreme Court's holding that a right of reply to political candidates in newspapers opposing them enhances the first amendment by furthering a free flow of information, the Supreme Court held that such a statute would abridge constitutional values: "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues, it cannot be legislated." Id. at 256.

225. 424 U.S. 1 (1975).

226. 424 U.S. at 49.

227. Just as "[t]he first amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion," 424 U.S. at 49, it should also not be made to depend upon a prospective recipient's ability to receive information. See also National Cable Television Association, Report to Senator Packwood; Cable Television, Government Regulation and the First Amendment, at 42-43 (April 1981) (the Buckley reasoning requires rejection of governmental attempts to regulate speech for socially beneficial purposes).

228. The factual premise of the government's interest in widest possible cable availability may be inaccurate with respect to geographically rural areas. Necessity is the mother of invention. Many of those in rural areas that cable could or would not reach have installed satellite dishes to capture the same (or more) television signals. USA Today, August 28, 1984, at 1, col. 3-4, and at 2, col. 1-2. Indeed, some dish owners believe they receive more stations for less money than their urban counterparts who subscribe to a cable service. Although there is considerable debate over the legality of the dishes and corresponding civil suits for injunctions to limit unauthorized signal reception, bills sponsored in both congressional houses would affirm their legality. Id.

Even without cable television, most homes receive over-the-air broadcast signals. It would be paternalism at its worst for the government to insist, at the sole expense of cable operators, that society should receive the greatest amount of information available. Clearly, the government could not attempt to require the New York Times or Washington Post at their expense to distribute to non-local areas in order to ensure that all communities receive the best newspapers. Nor could it

require inexpensive marketing of literary or cultural publications or art forms in order to bring higher quality entertainment to the public.

229. United States v. O'Brien, 391 U.S. 367, 376-77 (1968) ("[A] sufficiently important governmental interest in regulating the non-speech element [in a course of conduct that also contains a speech element] can justify incidental limitations of first amendment freedoms...if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of the interest."). See also Schaumburg v. Citizens for Better Environment, 444 U.S. 620, 637 (1980) ("[T]he village may serve its legitimate interests but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with first amendment freedoms.") This requirement applies whether a speaker seeks access to a public or non-public forum. Brown v. Glines, 444 U.S. 348, 355 (1980) (upholding air force regulations concerning petitions, although recognizing that there are fewer first amendment rights in an armed forces setting); Baldwin v. Redwood City, 540 F.2d 1360, 1365 (9th Cir. 1976) (restrictions may be imposed if they are "no greater than necessary or essential to the protection of the governmental interests") (footnote omitted).

230. United States v. O'Brien, 391 U.S. at 381.

231. See supra note 182.

232. See Preferred Communications, Inc. v. City of Los Angeles, No. 84-5541, slip op. at 24-25 (9th Cir. March 1, 1985) (City's exclusive franchise procedure violated first amendment principles despite the City's mandatory access and leased access requirements that enable a non-franchised cable operator to disseminate some programming on another operator's wires); see also supra note 184.

233. See Schad v. Mount Ephraim, 452 U.S. 61, 75-76 (1981) ("To be reasonable, time, place, and manner restrictions not only must serve significant state interests, but also must leave open adequate alternative channels of communication.").

234. Even assuming that anti-cream-skimming rules passed muster as a finely-tailored time, place or manner restriction, they nevertheless would be invalid as they fail to ensure alternative modes of communication for prospective cable operators. Once a would-be operator is denied access because of either financial inability or disinterest in serving the entire community, it will be cut-off from serving any part of the area and thus denied the opportunity to communicate at all. This amounts to a total ban, which is unconstitutional unless the government can establish that nothing short of a total ban will do. Wright v. Chief of Transit Police, 558 F.2d 67, 68 n.1 (2d Cir. 1977) (ban on distribution of newspapers in subway stations unconstitutional unless the governmental authority can prove that "nothing less than a total ban would serve [their] compelling state interest."). See also Greer v. Spock, 424 U.S. 828 (1976) (Powell, J., concurring) (exclusion of political speakers from military base is constitutional because forum is non-public and speakers had available alternative methods of communication with military; military could attend off-base speeches or rallies and receive political opinion on the base through mail, broadcast and the print media).

235. See Schad v. Mount Ephraim, 452 U.S. 61 (1981) (zoning ordinance barring all live entertainment was unconstitutional and not a valid time, place or manner restriction designed to protect the public interest); Preferred Communications, Inc. v. City of Los Angeles, No. 84-5541, slip op. at 24 (9th Cir. March 1, 1985) (exclusive franchise procedure is not a

valid time, place, or manner restriction because it failed to provide Preferred Communications with "an adequate substitute for its right to operate a cable system"); Rubin v. City of Berwyn, 553 F. Supp. 476, 480 (N.D. Ill.) (ordinance prohibiting unlicensed newsstands and granting broad discretion to licensor was unconstitutional because "although there is no doubt that Berwyn would be entitled to reasonably regulate or limit the locations or numbers of requested newsstands, these ordinances fail completely to specify a narrow objective or definite time, place, or manner restrictions consonant with first amendment considerations.") (citations omitted) aff'd, 698 F.2d 1227 (1982).

236. The Supreme Court stressed in Saia v. New York, 334 U.S. 558 (1934), that narrowly-drawn statutes rather than unbridled discretion should control abuses in a method of expression by a speaker. It struck down a permit system for the use of sound amplification devices on the grounds that the permit system did not prescribe standards for the grant of permits.

See Community Communications v. Boulder, 496 F. Supp. at 828-29. The district court concluded that the city's attempt to diversify cable programming by restricting cable operators to specified districts was not the least restrictive means of achieving the city's objective. It discussed alternatives that would satisfy the city's interest while preserving first amendment freedoms:

> "Legitimate concerns about repair of property or service blackouts may be addressed directly by a regulation imposing penalties for failure to correct such problems within a reasonable time. Likewise, a governmental interest in public service programming can be achieved in direct fashion

by negotiation for channels and payment of a fair price for the use of those channels."

See also Gannett v. Rochester, 330 N.Y.S.2d 648, 653, 69 Misc. 2d 619 (Sup. Ct. 1972) ("The ordinance [prohibiting newsboxes without permit] is guilty of overkill similar to shooting down a fly with a cannon.... [It] might as well restrict publication also, since the unrestricted publication of newspapers and magazines is of little value when coupled with restrictions of circulation.").

237. Southern New Jersey Newspapers v. New Jersey, 542 F. Supp. 173, 185 (D.N.J. 1982) ("[T]he statute's [banning newsboxes from specific highway systems] far-reaching coverage as to both the type of objects [newsboxes] and the geographic area [certain highways within the entire state] has resulted in an obstructive impact on a very important activity [distribution of a newspaper] occurring in an area [public sidewalks and area adjacent to public streets] which is highly valued by society as a place for such activity.") (footnote and citations omitted).

238. Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980).

239. As Professor Jones suggests in Origins of the Certificate, supra note 168, at 509, for a solution to cross-subsidization among consumer classes (anti-cream-skimming legislation): "[i]f there are community services that society wishes to perpetrate for policy reasons even though they may be unrenumerative...the objective need not be supported by cross-subsidization within the affected public service industries. There is the obvious alternative of providing direct public subsidies." See also Troxel, Economics of Public Utilities (1947). Professor Troxel explains that the radio industry, like cable, was not distributed equitably in the 1920's and 1930's. Congress attempted to alleviate

that unfairness by enacting statutes designed to equalize service and directing the Radio Commission "to maintain...an equal allocation of broadcasting powers, broadcasting frequencies and broadcasting time between the states and five national zones." Id. at 521. Since the equalization plan was not certain to increase service to rural areas, Congress repealed the legislation in 1936. Professor Troxel proposes that "a government can pay the costs of all broadcasting...[o]r the government can support only part of the stations. It can cover the deficits of those that are built to serve the sparsely settled areas." Id. at 528-29. See also Community Communications v. Boulder, 496 F. Supp. at 828-29 (suggesting that government pay for channels it wishes to use for public service programming).

In order to encourage cable applications for a franchise of the entire borough of the Bronx, New York City ultimately agreed not to collect a franchise fee for eight years after the commencement of service. See Memorandum of the City of New York, supra note 138, at 23. Thus, at least one government has perceived the need for government subsidy of anti-cream-skimming activities.

240. Professor Troxel, supra note 239, suggests that to equalize broadcasting service, "[t]he federal government can support some or all stations with general tax revenue or with receiver set fees.... Assessing an annual fee...the FCC has revenue that can be allocated to stations and networks according to their costs." Id. at 528-29. Of course, state or local governments as well as the federal government may assess a tax or impose a type of user fee on current cable subscribers. However, as Professor Jones, in Origin of the Certificate, supra note 168, points out, "[t]he ethical premises for having one class of customers support another are seldom articulated. Accordingly, it is difficult to predict whether

the premises would command general public support if put to the test." Id. If several cable systems are interested in serving a specific area, the government could, through one of the options outlined above or using any other alternative less infringing than compulsory community-wide service, have one operator service the government-desired locality while allowing "interconnection among telecommunications entities, thereby providing access to all subscribers notwithstanding a multiplicity of operating entities." Id. at 512 (footnote omitted).

241. The government's interest in providing cable access to all homes is also served by the proliferation of alternative forms of entertainment available to community residents whom the cable operator does not choose to reach. Satellite dishes and VCR's have made significant inroads into the potential cable market. Moreover, traditional entertainment forms, such as movies, theatre, sports events and broadcast television, are also available.

I. Statement of case

II. General first amendment principles relating to defamation
  a. private figure relating to public events -- constitutional standard (Rosenbloom)
    1. first amendment interests conflict with interest in reputation
  b. punitive damages discussion
    1. not available unless constitutional malice
    2. must be tied to actual damages
    3. discussion of free press case -- state considers them compensatory but are they compensatory
      a. but they are in theory tied to actual damages -- they actually are compensatory
  c. principal-agent discussion
    1. principal liability for tortious acts of agent--defamation
      a. cases and restatement

    2. principal liability for intentional torts of agent
  d. combination of principal-agent and first amendment implications